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HAROLD B. WILLEY, Clerk

# In the Supreme Court of the United States

OCTOBER TERM 1955

**No. 257**

SOUTHERN PACIFIC COMPANY, a Corporation,

*Petitioner,*

v.

CHARLES M. GILEO, EPIMENIO MORENO, ROQUE ARANDA, ALBERT EUFRAZIA and CHARLES EELK

## Brief for Petitioner Southern Pacific Company

On Writ of Certiorari to the Supreme Court of the State of California

ARTHUR B. DUNNE
333 Montgomery Street
San Francisco 4, California

HORACE B. WULFF
926 J Building
Sacramento, California

*Attorneys for Petitioner Southern Pacific Company*

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

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# In the Supreme Court of the United States

OCTOBER TERM 1955

**No. 257**

SOUTHERN PACIFIC COMPANY, a Corporation,

*Petitioner*,

v.

CHARLES M. GILEO, EPIMENIO MORENO, ROQUE ARANDA, ALBERT EUFRAZIA and CHARLES ELK

## Brief for Petitioner Southern Pacific Company

On Writ of Certiorari to the Supreme Court of the State of California

### PRELIMINARY

On April 29, 1955, the Supreme Court of California decided 5 cases, then pending in that court, entitled and numbered (in that court) as follows:

Charles M. Gileo, Plaintiff and Respondent, v. Southern Pacific Company, a corporation, Defendant and Appellant, SF No. 19090 (R1-242);

Epimenio Moreno, Plaintiff and Appellant, v. Southern Pacific Company, a corporation, Defendant and Respondent, Sac. No. 6520 (R243-302);

Roque Aranda, Plaintiff and Respondent, v. Southern Pacific Company, a corporation, Defendant and Appellant, Sac. No. 6521 (R302-383);

Albert Eufrazia, Plaintiff and Appellant, v. Southern Pacific Company, a corporation, Defendant and Respondent, Sac. No. 6522 (R384-528); and

Charles Eelk, Plaintiff and Appellant, v. Southern Pacific Company, a corporation, Defendant and Respondent, Sac. No. 6523 (R529-643).

These cases all involve "identical or closely related questions" (Rules U.S. Sup. Ct., Rule 23 subd. 5). In each a plaintiff-employee sued Southern Pacific Company, his employer, to recover damages for personal injuries received by him in the course of his employment in California. In each the plaintiff charged the defendant, as his employer, with negligence and based his action on the Federal Employers' Liability Act (45 USC § 51 ff). In each the defendant-employer asserted that the Federal Employers' Liability Act had no application because the activity in which the employer and employee were engaged was not common carriage by railroad but was manufacturing (*Gilco, Eufrazia* and *Eelk*, assembly line new car construction; *Aranda*, wheel making in a wheel foundry) or new construction (*Moreno*, construction of a new "retarder yard"), did not affect interstate commerce, and that the court had no jurisdiction because the employee's sole remedy was under the California Workmen's Compensation Act (Labor Code, Div. IV, § 3201 ff; *Scott v. I. A. C.*, 46 A.C. 75, 293 P2d ..., ...). In each case the Supreme Court of California held that the Federal Employers' Liability Act, by reason of the 1939 amendment to § 1, applied and held against the position of Southern Pacific Company, the employer-defendant. Deeming itself aggrieved Southern Pacific Company, the defendant-em-

ployer, agreeably to subdivision 5 of Rule 23 of the Rules of this Court filed a single petition for a writ of certiorari to review the judgments of the Supreme Court of California.[1] The petition was granted on October 10, 1955. (R643)

## OPINIONS BELOW

*Gileo v. Southern Pacific Company.* The trial court rendered no opinion. The opinion of the District Court of Appeal of the State of California, First Appellate District, Division Two (R235-241; App. to pet. for cert., pp. 5-12)[2] is reported in 124 A.C.A.[3] 951 and 269 P2d 150. The opinion of the Supreme Court of California (R229-233; App. to pet. for cert. 13-17) is reported in 44 C2d 539 and 282 P2d 872.

*Moreno v. Southern Pacific Company.* The opinion of the trial court (R249, 250; App. to pet. for cert. 20, 21), filed on the granting of defendant's motion for judgment *n.o.v.*, is not reported.[4] The appeal from the judgment was to the District Court of Appeal of the State of California, Third Appellate District. By order of the Supreme Court of California the case was transferred to the Supreme Court of California before decision by the District Court of Appeal

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1. A single consolidated record was filed. The record below, in each case, is a unit and forms a unified and separate part of the printed Transcript of Record, as indicated above.

2. The opinions are printed in the record as indicated below and, agreeably to Rule 23-1(i), in an appendix to the petition for certiorari.

3. Advance California Appellate Reports, the advance sheets of the opinions of the District Courts of Appeal of the State of California. The Supreme Court of California having granted a hearing and transferred this case to the Supreme Court for decision the opinion of the District Court of Appeal will not be officially reported.

4. The court directed that judgment in favor of the defendant be entered upon the ground that there was no evidence of negligence on the part of the defendant. The opinion does not deal with the question presented here.

and, by consequence, there is no opinion of the District Court of Appeal (R296, 301, 302). The opinion of the Supreme Court of California (R297-299; App. to pet. for cert. 23-25) is reported in 44 C2d 547 and 282 P2d 877.

*Aranda v. Southern Pacific Company.* The opinion of the trial court (R378-382; App. to pet. for cert. 28-33) is not reported. The appellate procedure was the same as in *Moreno* and there is no opinion of the District Court of Appeal.[5] (R373, 383) The opinion of the Supreme Court of California (R 374-377; App. to pet. for cert. 35-38) is reported in 44 C2d 543 and 282 P2d 875.

*Eufrazia v. Southern Pacific Company.* The opinion of the trial court (R393-402; App. to pet. for cert. 40-50) is not reported. The procedure on appeal was the same as in *Moreno* and there is no opinion of the District Court of Appeal. (R525, 528) The opinion of the Supreme Court of California (R526; App. to pet. for cert. 54, 55) is reported in 44 C2d 881, and 282 P2d 879.

*Eelk v. Southern Pacific Company.* The opinion of the trial court (R535-546; App. to pet. for cert. 57-70) is not reported. The proceedings on appeal were the same as in *Moreno* and there is no opinion of the District Court of Appeal. (R639, 642) The opinion of the Supreme Court of California (R640, 641; App. to pet. for cert. 74, 75) is reported in 44 C2d 882 and 282 P2d 880.

## JURISDICTION

The judgments of the Supreme Court of California sought to be reviewed, a separate judgment in each case, were rendered and entered on April 29, 1955. (R233, 299, 377, 527,

5. In each of the last four cases the certificate of the clerk of the District Court of Appeal shows that the four cases were argued together but transferred to the Supreme Court before submission was ordered.

641). There was no order in any of the cases respecting a rehearing or granting an extension of time within which to petition for certiorari. The judgments have become final (California Rules on Appeal, Rule 24) so far as the court below is concerned and remittitures issued (California Rules on Appeal, Rule 25) on May 31, 1955. (R233, 300, 377, 527, 641). The petition for certiorari was served on July 20, 1955 and filed here on July 22, 1955. Notice of filing, of the case number and of consist of the record was served August 3, 1955. The petition was granted October 10, 1955, (R643) The jurisdiction of this Court is invoked on the ground the court below decided appropriately raised federal questions of substance, the scope, effect and application of the Federal Employers' Liability Act (*Brown v. Western Railway of Alabama*, 338 US 294, 94 L ed 100; *Brady v. Southern R. Co.*, 320 US 476, 88 L ed 239; *Pennsylvania R. Co. v. O'Rourke*, 344 US 334, 97 L ed 367; and see p. 28 below). The statutory provision believed to confer on this Court jurisdiction to review the judgments by writ of certiorari is 28 USC § 1257(3). The petition was presented within the time specified in the Rules of this Court, Rule 22 subd. 3, and 28 USC § 2101(c).

## STATUTE INVOLVED

Each case involves § 1 of the Federal Employers' Liability Act, Act of Apr. 22, 1908, c. 149, § 1, 35 Stat. 63, as amended by Act of Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404[6] (45 USC § 51). The statute reads as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Terri-

6. The 1939 Amendment reenacted the first paragraph without change and added the second paragraph.

tories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and child of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases' (approved April 22, 1908), as the same has been or may hereafter be amended."

## QUESTIONS PRESENTED FOR REVIEW

When an employer, which, as to some of its activities, is a common carrier by railroad engaged in interstate commerce, is manufacturing new equipment (freight cars and car wheels) or constructing new facilities (a "retarder yard") which will be, but have not yet been, placed in rail-

road service, and an employee, employed by it in such manufacturing or new construction, is injured in the course of his employment as the result of negligence of the employer can the employee maintain an action for damages under the Federal Employers' Liability Act, Act of Apr. 22, 1908, c. 149, § 1, 35 Stat. 65, as amended by Act of Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404 (45 USC § 51)?

More precisely, has the 1939 amendment of § 1 of the Federal Employers' Liability Act, which amended that section by adding the second paragraph, obliterated the theretofore established distinction between maintenance and repair which fell within the Act, and manufacturing and new construction to which the Act did not apply?

Has this amendment of 1939 made the **sole** test of applicability of the Act, as amended, that of the second paragraph of § 1 added in 1939 so that the Act is applicable whenever any part of the duties of an employee is "the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce" and has it eliminated the theretofore established **second** test under the **first** and unchanged paragraph (reenacted in 1939 without change) that for the Act to apply the **employer**, with respect to the activity in question, must be acting as a (1) "common carrier" (2) "by railroad" (3) in such commerce?

Is not the specification of employees part of whose duties further interstate commerce narrower than the specification of those whose duties affect interstate commerce even though this must be directly or closely and substantially?

Is not the farthest reach of the amendment limited to employees part of whose duties "directly or closely and substantially affects" interstate commerce and do not these words have a settled meaning which excludes manufactur-

ing and new construction so that in these fields employees still have the benefits of state compensation statutes (even though the employer is without fault) and the protection afforded by state safety regulations?

## STATEMENT OF THE CASES

### I. The Facts.

#### A. GILEO, EUFRAZIA AND EELK[7]

To meet the shortage in railroad equipment following World War II Southern Pacific Company (hereinafter referred to as SP) undertook a large program of acquiring new equipment for itself and others. Part of this program was to have outside financing. For part of this program the Board of Directors of SP on August 17, 1950, adopted a resolution for acquisition of 5,000 units of freight train equipment at an estimated cost of $25,797,500.00; 2,925 units for SP and 2,075 for Texas & New Orleans Railroad Company (T&NO). Included in the T&NO units were 1,000 gondola cars (gons) at an estimated cost of $4,300.00 each.[8] (Def. Ex. A; R125, 126, 140)

On September 15, 1950, Southern Pacific Equipment Company (SPEC), by resolution of its Board of Directors, determined to build 2,000 of the 5,000 units, including the 1,000 T&NO gons.[9] (Def. Ex. B; R125, 126, 141). It was

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7. The leading opinion of the Supreme Court of California was in *Gileo v. Southern Pacific Company*. In *Eufrazia* and *Eelk* that court noticed that "the construction project was the same as that involved in *Gileo v. Southern Pac. Co.*,". Accordingly, unless otherwise indicated, we shall state the facts as they appear from the record in *Gileo* and the record references will be to the record in *Gileo*.

8. It is apparent from the lease (R150 ff) which is part of Def. Ex. H, (R127, 150 ff) that this $25,797,500 program was itself only part of a larger program.

9. The estimated cost of the 2,000 units was $9,800,000 (Def. Ex. B. R125, 126, 141).

Other equipment which SPEC undertook to acquire for the same

determined to build these 1,000 gons, nos. T&NO 47,000 to 47,999, both inclusive, at the SP shops at Sacramento, California (Def. Ex. C; R126, 142-144). To this end SPEC purchased all the necessary materials (R41, 128)[10] and entered into a contract with SP under which SP agreed to furnish the necessary shop facilities and labor (Def. Ex. C; R126, 142-144). SPEC also entered into agreements, and agreements were entered into by others, for the fuller carrying out of the program as follows: The cars, when manufactured, would be delivered to The Pennsylvania Company for Banking and Trusts, trustee under an equipment trust, title would pass to [redacted] trustee, the trustee would acquire funds by the sale of equipment trust certificates, use these funds to finance the cars, after junior financing had been done, and then lease the cars to the SP with the privilege of subleasing to T&NO.[11]

At Sacramento, California, SP had general shops i.e., shops which in its organizational set-up were separate from the operating or transportation division. Included in these shops were a passenger car shop and freight car shop No. 9. The freight car department was divided into two departments, New Car Construction and Old Repair Work. (R26, 27, 77, 78, 123-125)

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general program it did not construct but bought from manufacturers. Such a transaction is illustrated by Def. Ex. N (R136, 211-219), SPEC's purchase order P-3071 placed with Pullman-Standard Car Manufacturing Company for 1,600, 40-foot 6-inch freight box cars of 100,000 pounds capacity each. SPEC also built cars for concerns other than SP (R136).

10. Def. Ex. I and J (R128, 129, 201-205) are documents illustrative of the orders placed and method of payment.

11. The details are made to appear by the documents used, Def. Ex. D-H, incl. (R126-128, 145-200). The obvious purpose of lease and sublease was to lend the credit of SP to T&NO.

Programs of constructing new cars at shop No. 9 began July 1, 1950 (R27, 125). For this a new force was employed. (R 27, 28) At the time the plaintiffs were injured about 620 men were employed in this shop. Of these, 365 were carmen and helpers and of these 270 were employed in new car construction. The shop was divided into 2 departments, one doing repair work on equipment in service and the other doing new car construction. Each department was under the supervision of an assistant general foreman. The assistant general foreman in charge of new car building had under him foremen in charge of sections and crews on the assembly line for new car construction. (R26, 27, 30, 31 ff, 35, 40, 133-135) The assembly line consisted of tracks upon which were fixed stations for designated work. The line was so planned that the work at each station would take about 25 minutes. At the end of each such period the whole line moved forward one station. The program called for turning out 18 cars a day. (R31-35, 133-135)

New car construction was the "number one" program of shop No. 9 (R37, 38). The work went on without interruption except from January 8, 1951 to February 12, 1951 when there was a shortage of materials (R33, 34). During this period the new construction forces were assigned to other work to keep them intact. On February 13, 1951, new car construction was resumed with 500 automobile cars. These were followed on May 1 (R 605, 606 [*Eelk*], by the 1,000 T&NO gons. Up to the time of trial of *Gilco* these had been followed by 500 boxcars, 500 gons of one type and 400 gons of another type and another program of 1,500 box cars was in progress. (R34-36, 97, 125)

The work on the assembly line was so organized, and men so assigned to it, that if a man was absent from his place on the line the whole line stopped until that place

was filled (R53, 135). Accordingly, if there were any absences of men on the assembly line their places were temporarily filled by men normally working in the repair department. But men assigned to the assembly line on new car construction were not taken out of it and were not used temporarily for other work.[12] (R35, 37, 38, 40, 134-135, 137, 138)

Gileo, Eufrazia and Eelk were all injured while working on the assembly line in new car construction and on the program of construction of the 1,000 T&NO gons.[13] Gileo was injured July 11, 1951 while working on T&NO 47725 (R1, 4, 123, 124). Eufrazia was injured on July 10, 1951 (R385, 388, 412, 457). Eelk was injured on June 22, 1951 working on car shop No. 506 [T&NO 47505] (R530, 533, 583, 585, 596, 636).

Gileo went to work in the car shop in October, 1941 (R94) and worked in various portions of the shop. On February 12, 1951, he "bid in" as a freight carman welder and from that time on did no work except on new car construction until he was injured. (R95, 96, 97, 115) He first worked on automobile cars and then, from the time the gon program started in April, 1951, he worked without interruption on the gons (R97, 115).

Eufrazia was employed by SP in September 1950 as a

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12. If the men were taken off new car construction and put on repair work this was a permanent assignment. So long as a man was assigned to new car construction, however, he did nothing else. (R 135) Some witnesses were called to indicate that men went from repair to new construction and back to repair. But from their testimony it is clear that these were repairmen called only to fill temporary vacancies on the new car assembly line and that the men assigned to the new car line did no other work until there was a permanent change of assignment. (R35, 40, 51-55, 57, 61-64, 92, 93, 138, 96, 97, 115-117) The men, on the basis of seniority could bid into the shop but their work in the shop was assigned to them. (R28, 29, 38, 39)

13. See footnote 7 above.

helper (R413),[14] was made an up-graded carman in March 1951 (R417, 418) and on June 13, 1951, was assigned to new car construction on the gon program where he worked continuously until the time of his injury (R423, 458; 459). After his assignment to new car construction this was the only work he did (R459, 504).

Eelk was hired as a carman's helper in shop 9 on November 7, 1950.[15] He worked on old equipment until December 1,

14. The general material in the *Eufrazia* record will be found as follows: SPEC builds for others than SP (R492). By resolution it determined to build the 1000 T&NO gons (R478). It did so under shop order 2807 (R459, 519, 520). It made a contract to have SP supply shop and labor (R479). It paid the labor costs to SP (R488, 497, 503) and bought the materials (R486-488, 503). The cars were in part financed under an equipment trust with lease to SP and sublease to T&NO (R482, 483, 485, 490, 484, 495, 491). The shop (R501) and production line are described (R436, 506, 507, 510).

Men, on a seniority basis could bid into car shop 9 (from some other shop in the general shops) but their precise work was assigned to them by the supervisors. The new car construction program was the priority work of the shop. Absence to men from it would hold it up so that men assigned to new car construction were not taken from it temporarily to do other work but men doing repair work were shifted to the production line to fill temporary vacancies and keep the line moving. (R437, 521, 502, 511-513, 521-523)

Eufrazia was assigned to new car construction on June 13, 1951 and that was the only work he did until he was injured on July 10, 1951, working on the program of T&NO gons. (R413, 417, 418, 420, 431, 435, 452, 458, 459, 496, 504, 505)

15. The general material in *Eelk* will be found as follows: SPEC builds cars for service of others than SP (R630, 631). It determined to build the 1000 T&NO gons (R615, 616), contracted with SP to have SP furnish shop and labor, which SP did and SPEC purchased its own materials (R616, 605, 586-589, 591, 604). The cars were in part financed under an equipment trust with lease to SP and sublease to T&NO (R581, 582, 596, 597, 617-626, 629).

The 1000 T&NO gons were a $4,400,000 part of a $10,000,000 program. Work on them, under shop order 2807, started May 1, 1951. (R605, 606, 608, 609)

Car shop 9 is part of the general shops at Sacramento, California. The general shops are a distinct unit apart from the transportation division at Sacramento and reporting directly to the head office of SP (R556, 557, 560, 571, 576-578, 580). The shop builds and repairs cars (R560). It employed about 600 men, 312 on new car construction (R561-563, 578, 590). At the time in question it was building

1950, when he was assigned to new car construction. He remained on new car construction, except when it was shut down January 8-February 12, 1951, on account of shortage of material. When new car construction was resumed on February 13, 1951, he went back to that work and remained at it continuously until he was injured. He did no other work. (R589, 590, 607, 608)

**E. ARANDA**

For 40 or 50 years SP had operated a wheel foundry at Sacramento, California, for the manufacture of cast iron wheels (R 337, 340). The wheels were manufactured on order from the SP Store Department (R327, 329, 330, 343, 344-347). No wheel was made for any particular car. (R368) The wheels went into stock in the Store Department which kept on hand a 40 to 60 day supply. (R331, 337, 346, 368) The foundry acquired its own raw materials and supplies[15a]

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1000 T&NO gons (R567, 579, 594) for SPEC (R569, 580). The program called for 18 cars per day (R571, 584, 585, 590) and these new cars were built on an assembly line (R578, 584, 585, 601, 602) which moved on one "station" every 25 minutes (R584). Absence of a man from the assembly line would stop the line. The new car program was the priority program of the shop. Consequently men assigned to new car construction were not temporarily taken off the line for other work but men normally assigned to other work were used to fill temporary vacancies on the assembly line to keep it moving. (R564, 565, 578, 579, 590, 602, 603, 607, 608)

At the time Eelk was injured he was assigned to new car construction and under this assignment this was the only work he did. (R566, 583; 589-591, 607, 637)

15a. The store department acquired and stocked the material. It was 97% scrap wheels. Some were bought on the outside. It is standard for all manufacturers to use and melt down scrap wheels. It is preferred to use 100% scrap and Griffin does. Outside wheel manufacturers require an old wheel to be exchanged when a new wheel is bought. The reason is that it is difficult to get the proper and standard chemical content from raw material. The scrap wheels have it. In addition it is cheaper to use scrap. About 3% of new material is used because of the shortage of scrap and for control purposes. (R332, 334, 338, 350, 351, 357, 363; 365-367, 369, 370) The SP foundry is subject to the same regulations as other wheel manufacturers (R363).

(R342) but had nothing to do with the ultimate assignment and distribution of the wheels for use (R 337, 338, 368). In 1950, 67,734 wheels were made and in 1951, 65,216 (R338, 339).[15b] The wheels were sold and distributed as follows: to car shop 9, for new car construction by SPEC, 9,266 in 1950 and 27,694 in 1951; to Northwestern Pacific Railroad, 926 in 1950 and 724 in 1951; to small users 16 in 1950 and 10 in 1951. (R339, 341) The remainder went to various departments of SP for use as replacements on its own cars and the cars of other railroads (R339, 340). In 1950 and 1951 SP also bought freight car wheels from independent manufacturers. (R342)[15c]

Aranda, when he was injured on June 12, 1950, had been employed for some 11 years as a molder or molder's helper in the wheel foundry and was working as such making new wheels. (R 352, 355)

### C. MORENO

SP had 4 freight train yards near Roseville, California. Two were to the east near Roseville and there were 2 others a considerable distance to the west. Between the 2 yards at the east and the 2 at the west there was open country except for 2 main line tracks and 2 drill tracks. (R262, 263) SP determined to build a new retarder yard in this open area. The project was a large one.[16] To carry it out the following was done:

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15b. The foundry turned out about 324 wheels per day and spot tested 2 out of every hundred. If these did not test up all wheels within range of the test were scrapped. (R371, 368)

15c. About 84% of the wheels required by SP come from its own wheel foundry and 16% are purchased from independent manufacturers. SP, if it so elected, could buy all the wheels it required from such manufacturers. It bought 10,882 wheels in 1950 and 10,745 to December 1 in 1951 from outside makers, mostly from Griffin Wheel Co. in Los Angeles. (R324, 325, 327, 342, 343)

16. The total cost was a little over $1,000,000 (R270).

The drill tracks and main line were removed and a new main line was constructed about one-quarter of a mile to the north. (R257, 263) Eighty additional acres of land were acquired (R264). Two power lines, a gas line, a telephone line and a telegraph line were removed (R270, 266). The site was then graded to a new grade, above that of the old main. (R263, 271) The grading was done by an outside contractor and required moving 300,000 cubic yards of earth. (R266, 271) SP then went in with its own forces (R271), a force specially organized for this work, and did the remainder of the work. (R255, 275, 276, 277, 279, 280) This called for the following: The installation of 2 main tracks leading eastward to the top of a "hump", installation of 49 yard tracks to the east with 30 miles of track, 98 switches and 12 retarders, the construction of inspection pits at the point of entry to the new yard, the construction of rooms for doing necessary clerical work, the construction of 4 control towers, the installation of air compressors and connections for operating the retarders and installation of flood lights, new signals and a loud speaker and radio system. (R267-273)

Work on this new project began in April, 1951 (R255, 257). The SP forces went in the latter part of September, 1951 (R 271). The new main line was in operation and removal of the old main line began October 1, 1951 (R257, 258, 263). Moreno was employed on October 2, 1951. He worked only upon construction of this new yard.[17] (R284, 286, 287, 291, 293, 294) He was injured in December, 1951 (R244, 290). The first unit of the new yard, 21 tracks, was not opened and put into service until April 1, 1952, something over 3 months after plaintiff's injury (R258, 275).

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17. He testified that he worked for 15 days on the main line but this was taking out the **old** main line.

"Mr. Colley: Q. Do you know whether or not this main line you referred to was the new main line or an old main line? A. The old main line." (R287)

The retarder yard was new not only as to location and construction but it was new in the manner of operation. The cars being switched and classified, after being shoved eastward up to the top of the hump, then continued by gravity and were handled by power operated switches and retarders, controlled from the control towers, and without the necessity of men riding the cars to control them and without hand throwing of switches in the field. (R 256,-265) There is no evidence that any of the 4 old yards was to be abandoned.

## II. Proceedings Below and Stage Therein and Manner in Which the Federal Questions Were Raised[18]

### A. GILEO

Gileo's complaint (R1-3) was typical of complaints in actions under the Federal Employers' Liability Act. It alleged that defendant (petitioner here) was a corporation "engaged in the business of a common carrier by railroad in interstate commerce" (par. I), that "plaintiff was employed by defendant in such interstate commerce, and the accident complained of arose while plaintiff and defendant were engaged" in the conduct of interstate commerce (par. II) and that "this action is brought under and by virtue of the provisions of the Federal Employers Liability Act, 45 U.S.C.A. 51, et seq." (par. III) The remainder of the complaint avers the time and place of the accident, charges negligence and avers injury and damage.

By its answer petitioner raised the federal questions. It admitted that it was, "as a part of its business, engaged in the business of a common carrier by railroad in interstate and intrastate commerce" and was qualified as a self-insurer

18. A more detailed statement will be found in the petition for certiorari at pages 14-27.

under the California statutes (par. I.)[18a] that plaintiff was employed in carshop 9 and the time and place of injury. The remaining averments of the complaint, including those that defendant was a common carrier by railroad in interstate commerce and plaintiff was employed by it in such commerce and that the accident arose while the parties were so engaged, are denied. (R3-5)

Agreeably to Cal. CCP § 597 defendant moved "for an order to try separately the issues raised by paragraphs I, II and III of plaintiff's complaint and paragraph I of defendant's answer, namely whether this Court has jurisdiction of this action purportedly maintained under the Federal Employers' Liability Act, 45 USCA § 51, or whether under the Workmen's Compensation Act of the State of California the Industrial Accident Commission has exclusive jurisdiction of the plaintiff's claim."[19] (R5-7) This motion was transferred to be decided at the time of trial by the trial judge (R. 7).

At the beginning of the trial, and in his opening statement, counsel for the defendant, in outlining the matters

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18a. Its certificate of self insurance was proved and is set out in the record. (Def. Ex. M; R136, 216)

19. Unless operation of the California Workmen's Compensation Act (Labor Code, Div. IV, § 3201 ff) is excluded because the Federal Employers' Liability Act applies, the Workmen's Compensation Act provides the exclusive remedy of an injured employee, the tribunal having exclusive jurisdiction to enforce the remedy is the Industrial Accident Commission and courts are without jurisdiction to entertain an action by the injured employee against his employer. (Labor Code, §§ 3600, 3601, 5300, 5301; *Tipton v. Atchison etc. Co.*, 298 US 141, 80 L.ed 1091; *Scott v. I.A.C.*, 9 C2d 315, 70P2d 940; *Scott v. I.A.C.*, 46 A.C. 75, 293 P2d .....; *Esquer v. Teresi*, 105 CA 2d 89, 232 P2d 895; *Freire v. Matson Nav. Co.*, 19 C2d 8, 118 P2d 809; *I.A.C. v. Davis*, 259 US 182, 66 L.ed 888; *B. & M. R. Co. v. Armburg*, 285 U.S. 234, 76 L.ed 729; *Gaulden v. S. P. Co.*, 78 F.Supp. 651 (N.D. Cal.) aff'd on opinion below in 174 F2d 1022 (Circ. 9); *Hines v. I.A.C.*, 184 Cal. 1, 192 Pac. 859.) In *Raymond v. Chicago etc Co.*, 243 US 43, 44, 61 L.ed 583, 585 the issue was raised by pleading want of jurisdiction. See p. 28 below.

to which the evidence would be directed, again raised the question." (R20-24)

The reserved question of jurisdiction was not separately tried. Evidence on all the issues was taken. The Court indicated that it would rule, as matter of law, that the Federal Employers' Liability Act applied and would so instruct the jury. It was then stipulated that the issue of negligence should be resolved in favor of the plaintiff and that plaintiff, if entitled to recover, should recover $7,000 plus interest. The court ruled as a matter of law that the Federal Employers' Liability Act applied. Accordingly, it was stipulated that there was no issue for the jury and the jury was dismissed. Thereupon, as a matter of law, the Court ordered judgment in favor of plaintiff, and judgment for plaintiff was entered.[21] (R 10-12, 120-122, 139).

Defendant (petitioner here) appealed to the District Court of Appeal, State of California, First Appellate District (R13-15). The only questions there presented were those presented here. All other matters had been disposed of by stipulation. (R120-122)

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20. See the petition for certiorari pp. 15 and 16 where this portion of the opening statement is quoted.

21. The judgment (R10-12) recites fully how the issues were disposed of and the Court's determination that "resolving all conflicts in favor of defendant and drawing all permissible inferences of fact in favor of defendant, as matter of law, at the time and on the occasion when plaintiff was injured defendant, with respect to activities on its part connected with said injury, was a common carrier by railroad engaged in interstate commerce and plaintiff at said time and on said occasion was employed by it and as such employee part of his duties was the furtherance of interstate or foreign commerce and directly or closely and substantially affected such commerce, the Federal Employers' Liability Act (45 U.S.C. § 51 ff) applied" there is no issue for the jury and plaintiff is entitled to judgment. The pertinent parts of the judgment are set out in full in the petition for certiorari, pp. 16-18 and it is set out in full in the appendix to the petition pp. 1-4.

On April 28, 1954 the District Court of Appeal rendered its opinion reversing the judgment (R235-241; 124 ACA 951 and 269 P2d 150).[22] Its conclusion was that the FELA did not apply and "that SP was in no different position than a manufacturer, not engaged in railroading, which was manufacturing railroad cars to be delivered to any purchaser."

Upon application of the respondent Gileo the Supreme Court of California, on June 23, 1954, granted a hearing and transferred the cause into the Supreme Court for determination (R228, 229). On April 29, 1955 it affirmed the judgment of the trial court. (R229-233, 44 C2d 539, 282 P2d 872).[23]

**B. MORENO, ARANDA, EUFRAZIA AND EELK[24]**

The complaints in *Moreno* (R243-245), *Aranda* (R303, 304, 307-310), *Eufrazia* (R384-388) and *Eelk* (R529-533), while not exactly alike are substantially like the complaint in *Gileo*. They identify the defendant as a common carrier by railroad engaged in interstate commerce, the plaintiff as an employee of defendant employed in such commerce and injured while so employed, charge the defendant with negligence and allege damage. In each case the federal question was raised in the answer by appropriate denials of the averments of the activity in which the parties were engaged and by affirmatively setting up that the court had no jurisdiction of the subject matter of the action,[25] or averring the

22. Set out in the appendix to the petition for certiorari pp. 5-12.

23. Set out in the appendix to the petition for certiorari pp. 13-17.

24. The detail is set out in the petition for certiorari as follows: *Moreno* pp. 19-21, *Aranda* pp. 21-24, *Eufrazia* pp. 24, 25; *Eelk* pp. 25-27.

25. See footnote 19 above and p. 28 below.

precise work plaintiff was doing. (*Moreno*, R246-248; *Aranda*, R304-307, 310, 311;[26] *Eufrazia*, R388-391; *Eelk*, R533-535[26]).

In *Aranda* (R316, 317) and *Eelk* (R535) by consent and in *Moreno* (R300) and *Eufrazia* (R391-393) by order made on motion, agreeably to Calif. CCP § 597, the special issue of jurisdiction, i. e. whether the Federal Employers' Liability Act applied, was tried separately to the court, the court sitting without a jury.

In *Moreno* (R301) and *Aranda* (R382)[27] the court ruled that it had jurisdiction and that the Act applied but made no findings of fact, the cases then proceeded to trial on the other issues and the plaintiffs had verdicts and judgments. In *Moreno*, on motion, judgment notwithstanding the verdict was entered for defendant on the ground that, as matter of law, there was no evidence of negligence (R249, 251).[28] In *Eufrazia* (R393-402)[29] and *Eelk* (R535-546)[30] the court concluded that the Act did not apply and that plaintiff's sole remedy was under the California Workmen's Compensation Act (Labor Code § 3201 ff). On findings of fact and conclusions (*Eufrazia* R403, 404; *Eelk* R546-548) judgments were entered for defendant (R405, 406, 548).

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26. In *Aranda* the averments of the complaint were denied and it was averred that plaintiff was employed "exclusively in the construction of new railroad car wheels, and was not employed in interstate commerce." (R305) In *Eelk* it was affirmatively set up that plaintiff was engaged in new car construction (R533).

27. The trial court filed an opinion (R378 ff) set out in the appendix to the petition for certiorari pp. 28-33.

28. The opinion is set out in the appendix to the petition for certiorari pp. 20, 21.

29. The opinion is set out in the appendix to the petition for certiorari pp. 40-50.

30. The opinion which simply follows, and sets out, the trial court's opinion in *Eufrazia* is set out in the appendix to the petition for certiorari pp. 57-70.

In *Moreno* (R251-253), *Eufrazia* (R406-408) and *Eelk* (R549, 550) the plaintiffs, and in *Aranda* (R313-316) the defendant appealed to the California District Court of Appeal, Third Appellate District. The cases were argued there together but, before decision there, were transferred to the California Supreme Court. (R296, 302, 373, 383, 525, 528, 639, 642) They were decided in the Supreme Court on April 29, 1955 with *Gileo*. The judgment in *Aranda* was affirmed and the judgments in the other three cases were reversed (R299, 377, 527, 641).

## III. Grounds of the Decisions Below

The short of the holdings of the Supreme Court of California is that where an employee of an employer which, as to some of its activities, is a common carrier by railroad in interstate commerce, is injured in the course of his work and claims that the injury resulted from the negligence of his employer the **sole**[31] test of application of the FELA is whether the **employee** falls within the extended area of application of the act as to **employees** resulting from the 1939 amendment of § 1 of the act which, re-enacting the first paragraph, added a new and second paragraph. The holdings are that it is immaterial whether the **employer**, as to the activity in question, is acting as a **common carrier** or a **railroad** (the test under the first and unchanged paragraph of § 1) if in a general sense it is a railroad (but *cf. contra Raymond*, p. 60 below; see note 61 below); that the only question is whether any part of the duties of the employee "shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce". The holdings are that the theretofore estab-

31. All emphasis by boldface, whether in quoted matter or elsewhere, is ours.

lished distinction between new construction (where the act did **not** apply) and repair and maintenance of existing facilities already devoted to common carriage by railroad in interstate commerce (where the act did apply) has been abolished and that the manufacture of car wheels and new cars, and the construction of a wholly new yard, "further interstate commerce or affect it * * * 'directly or closely and substantially'," and that this is all that need appear.

The leading opinion of the Supreme Court of California is in *Gileo* followed, without discussion, in *Eufrazia* (R526) and *Eelk* (R640). In *Gileo,* after stating the facts and quoting the statute, the court said:

> "It is the position of defendant that it is not liable under the act unless it can be said that in manufacturing railroad cars it was engaged in intersate commerce.[32] This argument overlooks the effect of the second paragraph of the section quoted above, which was added by amendment in 1939. Under that paragraph, plaintiff is considered to have been employed by defendant in interstate commerce and is entitled to the benefits of the act if his duties were in the furtherance of such commerce or affected it in any way 'directly or closely and substantially.' (*Erickson v. Southern Pac. Co.*, 39 Cal.2d 374, 378 [246 P.2d 642])" (R231)

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32. With deference, the position of the defendant, petitioner here, was not and is not so restricted. The defendant rested its position (in part) upon the opening provision of § 1 of the FELA, reenacted in 1939 without change, which states that the liability being provided for is that of "every **common carrier** by **railroad while** engaging in commerce between any of the several states * * *." The defendant's position was that with respect to the activity in question it must not only be shown that the employer was "engaging in commerce between any of the several states" but also that in respect of such activity it was also a (1) "common carrier", (2) "by railroad". It is also petitioner's position that the men do not fall with the classes of employees specified in the second paragraph of § 1.

The court then said that the 1939 amendment was designed to include employees previously excluded and to eliminate confusion and hardship; that to this end doubt should be resolved in favor of application of the act. (R231) A number of cases were then referred to and it was said that the duties of Gileo "were at least as intimately connected with interstate commerce" as in the cases cited.[33] (R 231) The court continued:

> "Before the broad language now appearing in the act was added by the amendment in 1939, some decisions indicated that there was a distinction between an employee repairing equipment already operating in interstate commerce and one constructing equipment later to be used in that commerce, and it was held that the latter did not have federal coverage. (*New York Central R. R. Co. v. White*, 243 U.S. 188, 192 [37 S.Ct. 247, 61 L.Ed. 667]; *Raymond v. Chicago, M. & St. P. R. Co.*, 243 U.S. 43, 45 [37 S.Ct. 268, 61 L.Ed. 583]; see *Pedersen v. Delaware, L. & W. R. Co.*, 229 U.S. 146, 152 [33 S.Ct. 648, 57 L.Ed. 1125].) The only case decided after 1939, however, in which such a distinction was applied is *Moser v. Union Pac. R. Co.*, (1944) 65 Idaho 479 [147 P.2d 336, 153 A.L.R. 341], where a divided court held that an employee working on the construction of four miles of new track was not covered by the act. We cannot agree with the reasoning of the majority opinion in the *Moser case*. Under the language added by the amendment, an employee of a common carrier by railroad is entitled to the benefits of the act if his duties further intertsate commerce or affect it in any way 'directly or closely and substantially,' regardless of whether the work which he is doing may be classified as new construction or repairs. The cars on which plaintiff was working were intended to be used in interstate commerce, and it is clear that the construction of the cars furthered such commerce." (R232)

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33. The cases cited are discussed below pp. 101-104.

The opinion in *Aranda* (R374-377) really adds nothing. The procedure of the case is briefly stated and there is a brief statement of the facts. The court then said that "Federal coverage has been extended to employees injured while performing duties similar to those involved here" (citing three of the cases cited in *Gileo*, with a brief statement of their facts). (R375) The remainder of the opinion on this point is:

> "In the present case, some of the wheels which plaintiff molded were to be used in repairing railroad cars moving in interstate commerce, and the importance of his work to that commerce was not reduced by the fact that the wheels were temporarily stored before being used. We are of the opinion that plaintiff's duties furthered interstate commerce. He is, therefore, considered to have been employed by defendant in interstate commerce and is entitled to the benefits of the act. (*Gileo v. Southern Pac. Co., ante*)." (R375)

The opinion in *Moreno* (R297-299) after a very brief statement of the proceedings and facts and reference to two cases disposes of the case on the basis of *Gileo*:

> "In the present case, the construction was new, but the yard was intended as a substitute for the existing method of switching and classifying railroad cars. The proper designation of the work, however, is not important since the applicability of the act depends on whether an employee's duties further interstate commerce or affect it 'in any way directly or closely and substantially.' (*Gileo v. Southern Pac. Co.*, ante; 45 U.S.C.A. § 51.) We are of the view that, under the circumstances involved here, plaintiff's duties furthered interstate commerce. He is, therefore, considered to have been employed by defendant in that commerce and is entitled to the benefits of the act. (*Gileo v. Southern Pac. Co.*, ante)." (R298)

## SUMMARY OF ARGUMENT

If the cases do not fall under the Federal Employers' Liability Act (p. 5 above) the California Labor Code § 3201 ff applies the courts below were without jurisdiction as matter of California law and the judgments of the Supreme Court of California must be reversed. (Pp. 28, 29 below.)

The situation out of which the FELA, as amended in 1939, emerged is a frame of reference in which it must be viewed and construed (pp. 30-33 below). The amendment must be construed in the light of the history of the Act which it amends, experience under that Act and the settled construction of that Act.

Important to the Act of 1908, pointing up its self-restraint, is the historical fact that an earlier congressional attempt in the field was held beyond the power of Congress under the commerce clause (pp. 33-37 below). Responsive to that holding the FELA of 1908 was carefully limited (to cure the infirmities of the Act of 1906) to (1) employers who were "common carriers by railroad while engaging" in interstate commerce and (2) employees "while * * * employed by such carrier in such commerce". (P. 37 ff)

Application of the statute presents questions not of constitutional power but of statutory construction. (Pp. 37-39 below.) For the Act of 1908 to apply **both** the employer and the employee must be of the sort described by § 1 of the Act (pp. 39-41 below). The employer must be acting as a **common carrier** and carrying by **railroad** (pp. 41-45 below), the injured man must have to that activity the conventional relation of employee (pp. 45-47 below) and both must be engaged in interstate commerce at the moment of injury (pp. 47-49 below). It results that a man might be in and out of the Act several times on the same shift. (Pp. 48, 49 below.)

In applying the limitation that the parties must be en-

gaged in interstate commerce, having in mind that the business of a railroad is providing transportation, and that the Act was not designed to cover all employees of a railroad however remote their work was from the heart of that business, this Court defined interstate commerce, under the Act of 1908, as interstate **transportation** or work so closely related to it as to be practically a part of it (see pp. 49-52 below). Applying this test it was settled that the Act applied to crews when moving **interstate** vehicles but not to those not so engaged (p. 52 below); to servicing interstate power and cars but not rolling equipment withdrawn from service for heavy repairs or unassigned (p. 55 below); to keeping the line clear for interstate movements and otherwise directly facilitating them (p. 56 below); to repair and maintenance of a line in use in interstate commerce but not to new construction (p. 57 below); and **not** to acquiring or storing supplies (p. 60 below) or work with equipment or structures which do not use, or are not part of, the line itself, although these cases were borderline and this Court at one time took a contrary view (p. 50 ff, 61 below).

A latitudinarian construction of the Act is no unmixed blessing. It may well serve to deprive an injured man of any relief and of relief to which he would be entitled (as under state compensation acts) if it did not apply. (P. 61 below.)

In this situation Congress adopted the amendment of 1939 with the limited objectives of elimination of the moment of injury rule (specifically mentioning in the Senate report on the bill switchmen and rolling equipment maintenance men) and bringing under the Act the borderline cases (pp. 63-77 below). The amendment reenacted § 1, with the construction put upon it by this Court, without change except that an added clause re-defined the word "employee". The defini-

tions of employers covered (see § 1), or of interstate commerce (by decision,—see below) were not tampered with. (Pp. 69-72 below.) There is no suggestion that local new construction or manufacturing were brought under the Act or that it was to apply to an employer who was not, as to the business in hand, acting as a railroad or a carrier (pp. 69-72 below).

The change in the amendment during the course of passage, by eliminating a proposed change and by inserting the limiting words "directly or closely and substantially" (p. 63 below) and the Committee report on the bill (p. 65 below) point out the modest objectives. The form of the amendment of 1939 confirms this (p. 67 below). The restrictive language is not of new and uncertain meaning and excludes manufacturing and new construction (p. 72 ff below).

The conclusion urged is fortified by the consideration that to apply the FELA here will not only displace the state compensation act but will, in effect, deprive men in manufacturing and new construction of a large part at least of the benefit of a comprehensive system of state safety regulation without substituting anything for it (p. 73, 84 ff below). In analogous situations this Court has held that activity like that here involved had no direct relation to navigation and commerce and permitted the men the benefits of the state scheme (p. 92 ff below).

Lower federal court and state court decisions have not extended the FELA as amended as far as would the decisions now here for review (p. 94 ff below).

*Mitchell v. Vollmer & Co.*, under a different statute, provides its own authoritative and controlling distinction from cases under the FELA and in any event is no authority for the proposition that petitioner here was acting as a common carrier or a railroad within the requirements of the unamended part of § 1 of the FELA (p. 104 below).

## ARGUMENT

### I. The Trial Courts Lacked Jurisdiction Unless The Federal Employer's Liability Act Applied

Each respondent, at the time he was injured, was an employee of Southern Pacific Company. The injury was suffered in California. The injury arose in the course of and out of the employment,—the men were hurt on the job. In such circumstances, if the law of California alone be looked to, the sole remedies are under the California Workmen's Compensation Act (Lab. Cod. § 3201 ff) and the California Industrial Accident Commission alone has jurisdiction to determine whether the men are entitled to any benefits and, if they are, what those benefits should be.

*Scott v. Ind. Acc. Com.*, 46 A.C. 75 293 P 2d .....;

*Hines v. Ind. Acc. Com.*, 184 Cal. 1, 192 P 859;

*Scott v. Ind. Acc. Com.*, 9 C2d 315, 70 P2d 940 (disapproving earlier California cases);[34]

*So. Pac. Co. v. Ind. Acc. Com.*, 19 C2d 271, 120 P2d 880 and companion cases in 19 C2d;

*Ind. Acc. Com. v. Davis*, 259 US 182, 66 L ed 888;[35]

*Boston & M. R. v. Armburg*, 285 US 234, 76 L ed 729;

*Tipton v. Atchison etc. Ry. Co.*, 298 US 141, 80 L ed 1091;[36]

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34. See also note 19, p. 17 above.

35. The California Industrial Accident Commission made an award. The California District Court of Appeal reversed upon the ground that operation of the California statute was excluded because the FELA applied. This court reversed the California District Court of Appeal.

36. A switchman sued for injuries alleged to have resulted from a defective coupler used in violation of the Safety Acts. The complaint did not allege that he was engaged in interstate commerce. This Court held that the Safety Acts did not themselves create a cause of action for injury resulting from their violation and that where the FELA did not apply the law of the state must be looked to to determine what remedy the injured employee had; that where

*Gaulden v. So. Pac. Co.*, 78 F. Supp. 651 (N.D. Cal.), aff'd for the reasons and on the grounds stated by the trial court, 174 F2d 1022, (Cir. 9).

But if the Federal Employer's Liability Act (45 USC § 51 ff—see p. 5 above) applies it occupies the field, supersedes the state law and there is no room for operation of the state statute.

*Mondou v. N. Y. etc. R. Co.*, 223 US 1, 53, 56 L ed 327, 347;

*St. Louis etc. Ry. Co. v. Seale*, 229 US 156, 158, 57 L ed 1129, 1133;

*No. Car. R. Co. v. Zachary*, 232 US 248, 256, 58 L ed 591, 594;

*Shanks v. Delaware etc. R. Co.*, 239 US 556, 60 L ed 436;

*N. Y. C. R. Co. v. Winfield*, 244 US 147, 61 L ed 1045;

*N. Y. C. R. Co. v. Porter*, 249 US 168, 63 L ed 536;

*So. Pac. Co. v. Ind. Acc. Com.*, 19 C2d 271, 120 P2d 880 and companion cases in 19 C2d.

If the state statute applies the court below had no jurisdiction. It had jurisdiction only if the FELA, giving the employee a right of action, is controlling.

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as in California, the common law had been superseded by a Workman's Compensation statute the sole remedy provided was under that statute and the action could not be maintained. Some doubt had existed as to the law of California because of 2 decisions in the District Court of Appeal but the question was sufficiently doubtful to permit the Circuit Court of Appeals for the Ninth Circuit to make its own determination of the law of California. The Supreme Court of California then brought the law of California into harmony with the *Tipton* holding in the *Scott Case*, 9 C2d 315, cited above in the body, and disapproved the 2 earlier California cases which had created the doubt.

## II. The FELA Must be Viewed In its Historical Setting

Beginning in 1906, before any compensation statutes had been adopted in this country,[37] Congress undertook a course of legislation which had for its target what, in the circumstances of railroading, were harsh and anachronic defenses to an employee's claim for compensation for on-duty injury.[38] One program, the first undertaken,[39] culminated in the statute with which we are concerned, the Federal Employers' Liability Act of 1908 as amended (45 USC [illegible]1 ff). The precise targets were the common-law defenses of the fellow servant rule, contributory negligence and assumption

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37. Workmen's compensation legislation began in Germany in 1884. There was such legislation in England by 1897. The first compensation statute in this country was for certain government employees, the Act of May 20, 1908, 35 Stat. 556. This was shortly followed by state compensation legislation. The first state act was that of Montana of 1909.

Up to 1906 compensation of railroad employees for injuries, like other employees, was a matter of state law. The various states, allowing recovery for injuries caused by negligence, had, from time to time, adopted statutes modifying the common-law defenses of negligence of a fellow-servant, contributory negligence and assumption of risks. There was no uniformity in this legislation. (*Mondou v. N. Y. etc. R. Co.*, 223 US 1, 51, 54, 56 Led 327, 346, 348; *South Buffalo Ry. Co. v. Ahern*, 344 US 367, 371, 97 Led 395, 401.)

38. See *N. Y. C. R. Co. v. White*, 243 US 188, 197 ff, 61 Led 667, 672 ff.

39. There had been earlier legislation dealing with the subject of employee safety, the so-called Safety Acts (45 USC § 1 ff) and there was later legislation on this subject, the Boiler Inspection Act, etc. (45 USC § 17 ff). But these Acts had to do with the duty of the employer and not with the defenses he might urge except as the Act of Mar. 2, 1893, c. 196 § 8 (27 Stat. 531; 45 USC § 7) abolished the defense of assumption of risk where that statute had been violated.

Later statutes of general application, are the Jones Act of Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007 (46 USC § 688) applying to seamen and the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, c. 509, 44 Stat. 1424 applying as its name suggests.

of risk.[40] In the cases now before the court we are not concerned with the measures taken. We are concerned with the area of impact of the effort. It has a background of Constitutional limitations.

"The federal union is a government of delegated powers. It has only such as are expressly conferred upon it and such as are reasonably to be implied from those granted." (*United States v. Butler*, 297 US 1, 63, 80 L ed 477, 487; *United States v. Darby*, 312 US 100, 85 L ed 609;[41] *Carter v. Carter Coal Co.*, 298 US 238, 291, 80 L ed 1160, 1178.) For this railroad legislation Congress used its power under the

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40. The Acts of 1906, and 1908 and the amendments to the latter in 1910 and 1939 had other provisions as to the time within which action must be brought, jurisdiction of state courts, non-removability of actions from state to federal courts, remedies in the case of death, restrictions on the contracts which could be made with respect to injuries and provision for securing information. But the main thrust of the legislation was at the common-law defenses. As to these defenses:

The Act of 1906 undertook to abolish the fellow servant doctrine and to substitute for the common-law defense of contributory negligence the comparative negligence rule where the contributory negligence was slight and the negligence of the employer was gross in comparison.

The Act of 1908 abolished the fellow servant rule, substituted for the rule that contributory negligence was a bar the comparative negligence rule in all cases except where there was a violation of the safety appliance acts and provided that where there was a breach of the safety acts contributory negligence and assumption of risk were not defenses. In other cases assumption of risk was a defense. The 1939 amendment abolished the defense of assumption of risk where injury resulted from the employer's negligence and obliterated "every vestige of the doctrine of assumption of risk." (*Tiller v. Atl. C. L. R. Co.*, 318 US 54, 87 L ed 610.)

41. The question discussed in *Darby* was the power of Congress under the commerce clause to regulate local activities which reflected themselves in interstate commerce. In the cases at bar we are concerned with no such question but only with the question of statutory construction and determination of the extent to which Congress elected to exercise its power under the commerce clause. See below, pp. 37, 38. Cf. *Walling v. Jacksonville Paper Co.*, 317 US 564, 570, 87 L ed 460, 467; *McLeod v. Threlkeld*, 319 US 491, 493, 87 L ed 1538, 1541; *10 East 40th St. Bldg. Co.*, 325 US 578, 89 L ed 1806.

commerce clause. That its exercise of the power would not offend constitutional limitations it wrote into the act of 1908 an express limitations on the Act's application. By amendment in 1939 one of the limitations was relaxed. The question here is the effect of the 1939 amendment. The question is illuminated by 50 years of history.

Neither the Act of 1908 nor the 1939 amendment was enacted in a vacuum. Both, and more particularly the amendment of 1939, had legislative and judicial antecedents.[42] This Court is "not limited to the lifeless words of the statute and formalistic cannons of construction in" its "search for the intent of Congress. The Act" and the amendment were "the product of a period, and, 'courts, in construing a statute, may with propriety recur to the history of the times when it was passed.'" (*Gt. Northern R. Co. v. United States*, 315 US 262, 273, 86 L ed 836, 841.)

> "The purpose of Congress is a dominant factor in determining meaning. **There is no better key to a difficult problem of statutory construction than the law from which the challenged statute emerged.** Remedial laws are to be interpreted in the light of previous experience and prior enactments. Nor, where doubt exists, should we disregard informed Congressional discussion." (*United States v. C. I. O.*, 335 US 106, 112, 92 L ed 1849, 1856.)

The legislative and judicial background of the 1939 amendment of the FELA is of peculiar significance because of the form of the amendment, a verbatim reenactment of

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42. "The statute cannot be divorced from the circumstances existing at the time it was passed, and from the evil which Congress sought to correct and prevent." (*United States v. Champlin Ref. Co.*, 341 US 290, 297, 95 L ed 949, 955. Cf *N. Y. Trust Co. v. Eisner*, 256 US 345, 349, 65 L ed 963, 983 ("Upon this point a page of history is worth a volume of logic."); *Texas etc. Co. v. I. C. C.*, 162 US 197, 218, 40 L ed 940, 947.)

the pertinent section of the Act (§ 1, 45 USC § 51), as it then read, and the addition of a paragraph merely redefining the word "employee" (see p. 69 below).

## III. The FELA Has a Background of Adjudicated Constitutional Limitations on its Coverage.

On June 11, 1906, the first Employers' Liability Act[43] (34 Stat. 232, c. 3073, U.S. Comp. Stat. Supp. 1907, p. 891) was adopted. This Act made "every common carrier engaged in trade[44] or commerce" in the District of Columbia, in the Territories and in interstate trade or commerce "liable to any[44] of its employees, or, in the case of his death, to his personal representative * * * for all damage which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars" and other equipment and facilities.[45] It was not limited to railroads.

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43. The Act was entitled: "An Act Relating to Liability of Common Carriers in the District of Columbia and Territories, and Common Carriers Engaged in Commerce Between the States and Between the States and Foreign Nations to Their Employees."

44. The emphasis is for contrast with the later Act of 1908.

45. The full text of the first section of the Act, providing for its coverage, is: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several states, or between any territory and another, or between any territory or territories and any state or states, or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, shall be liable to any of its employees, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works."

On January 6, 1908, this Court held this statute unconstitutional as applied to injury or death as the result of an accident in any of the States. (*Howard v. Ill. C. R. Co.* and *Brooks v. So. Pac. Co.*, 207 US 463, 52 L ed 297) The ground was that the coverage of the statute was too broad and beyond the power of Congress under the commerce clause.[46] The argument that the Act was beyond the competence of Congress because it regulated the relation of master and servant was rejected. But the argument that the statute was unconstitutional because the area of coverage was too broad and it undertook to regulate that relationship in activities which were not interstate commerce was sustained.

This Court first noticed the coverage of the Act as to persons;

> "From the 1st Section it is certain that the Act extends to **every** individual or corporation who may engage in interstate commerce **as a common carrier.**[47] Its all-embracing words leave no room for any other conclusion. It may include, for example, steam rail-

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46. Congress has plenary power (subject to the limitation of due process) to legislate for the District of Columbia and the Territories. It need not look to the commerce clause. The provisions of the Act of 1906, as applied to the District of Columbia and the Territories, were severable and valid. (*El Paso etc. Co. v. Gutierrez*, 215 US 87, 54 L.ed 106; *Santa Fe etc. Co. v. Friday*, 232 US 694, 58 L.ed 802; *Washington etc. Co. v. Downey*, 236 US 190, 59 L.ed 533.) That this would be the result when the question was raised was pointed out in *Howard* (207 US at p. 500). Accordingly, it is in force in the District of Columbia and the Territories except as it has been superseded by the Federal Employers' Liability Act of 1908 or other statute (*Phila. etc. R. Co. v. Schubert*, 224 US 603, 56 L.ed 911; *So. Ry. Co. v. Taylor*, 16 F2d 517 (Circ. Dist. Col.), cert. den. 273 US 767, 71 L.ed 882).

47. *Ill. C. R. Co. v. Behrens*, 233 US 473, 477, 58 L.ed 1051, 1054 also noticed that the Act of 1906 "attempted to regulate the liability of **every** carrier in interstate commerce, **whether by railroad or otherwise**". The Act of 1908 made a decided, and for the case at bar a most significant, change by limiting the act to employers who were common carriers **by railroad**.

roads, telegraph lines, telephone lines, the express business, vessels of every kind, whether steam or sail, ferrys, bridges, wagon lines, carriages, trolley lines, etc. Now, the rule which the statute establishes for the purpose of determining whether all the subjects to which it relates are to be controlled by its provisions is that anyone who conducts such business be a 'common carrier, engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several states,' etc."

It was held that it followed that the Act applied to all of the activities of the persons described and did not confine itself "to the interstate commerce business which may be done by such persons."

"Stated in another form, the statute is addressed to the individuals or corporations who are **engaged** in interstate commerce, and is **not confined solely to regulating the interstate commerce business which such persons may do**,—that is, it regulates the persons because they engage in interstate commerce, and does not alone regulate the business of interstate commerce.

"And the conclusion thus stated, which flows from the text of the act concerning the individuals or corporations to which it is made to apply, is further demonstrated by a consideration of the **text of the statute defining the servants to whom it relates.**

"Thus, the liability of a common carrier is declared to be in favor of **'any** of its employees.' As the word 'any' is unqualified, it follows that liability to the servant is coextensive with the business done by the employers whom the statute embraces; that is, it is in favor of **any** of the employees of **all** carriers who engage in interstate commerce. * * *

"The act, then, being addressed to **all** common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employees, **without qualification or restriction as to the business**

**in which the carriers or their employees may be engaged at the time of the injury,** of necessity includes subjects wholly outside of the power of Congress to regulate commerce. Without stopping to consider the numerous instances where, although a common carrier is engaged in interstate commerce, such carrier may, in the nature of things, also transact business not interstate commerce, although such local business may indirectly be related to interstate commerce, a few illustrations showing the operation of the statute as to **matters wholly independent of interstate commerce** will serve to make clear the extent of the power which is exerted by the statute. Take a railroad engaged in interstate commerce, having a purely local branch operated wholly within a state. Take again the same road having shops for repairs, **and, it may be, for construction work,** as well as a large accounting and clerical force, and having, it may be, storage elevators and warehouses, **not to suggest, besides, the possibility of its being engaged in other independent enterprises.** * * *

"As the act thus includes many subjects wholly beyond the power to regulate commerce, and depends for its sanction upon that authority, it results that the act is repugnant to the Constitution, and cannot be enforced unless there be merit in the propositions advanced to show that the statute may be saved."

We have quoted *Howard* at length because it is not alone the holding which illuminates the Act of 1908 but, as well, the construction put upon the Act of 1906. The statement of the scope of its coverage shows with what care and with what deliberately limiting purpose Congress used the restrictive language of the Act of 1908[47a] (obviously, for one restriction; enacting the construction suggested in the dis-

47a. Cf. *Jensen*, note 50 below.

sent of Mr. Justice Holmes[48]) and, indeed, with what care this Court spoke in discussing the scope of the Act of 1908.

Any future question arising from the construction adopted in *Howard* Congress removed when it enacted the statute of 1908. The holding of *Howard*, on the constitutional question (assuming the correctness of the majority's construction of the statute) has never been questioned. But even if now the case would not be followed that is beside the point in determining the meaning of the language which Congress used in 1908 for in that regard the only material matter is the position of this Court at that time. In an analogous situation *Federal Power Com'n v. East Ohio Gas Co.*, 338 US 464, 472, 94 L ed 268, 277 said:

> "But *prior* constitutional decisions, not what we have since decided or would decide today, form the measure of a gap which Congress intended to close by this Act."[49]

## IV. Limited Coverage of the Act of 1908

Congress promptly enacted a second Employers' Liability Act (35 Stat. 65; see p. 5 above) effective April 22, 1908, limited to regulation of railroading.[49a] Sensitive to *Howard*, p. 34 above, the construction of the Act of 1906 upon which the holding of that case was bottomed and the consequent infirmities of that Act, Congress carefully restricted the coverage of the Act of 1908[50] to matter well within the limits

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48. The dissents went upon the ground the statute could be construed to apply only to the interstate business of common carriers and the employees engaged in that business at the time of injury. Mr. Justice Holmes (207 US at 541) though the words " 'every common carrier engaged in trade or commerce' could be construed to mean 'while engaged in trade or commerce' ". Compare the language used in the Act of 1908, p. 5 above and p. 47 below.

49. Emphasis is that of the Court.

49a. Cf. note 47 above.

50. *So. Pac. Co. v. Jensen*, 244 US 205, 212, 61 L ed 1086, 1097 noticed the holding of the *Howard* Case and in immediate sequence said: "The later act is carefully limited * * *." See other language quoted in note 59 below.

of its power by expressed restrictions in § 1, the controlling provision. (*Ill. Cent. R. Co. v. Behrens*, 233 US 473, 477, 58 L ed 1051, 1054.) That section, so far as we are now concerned with it, provided:

> "Every common carrier **by railroad while engaging** in commerce between any of the several states * * * shall be liable in damages to any person suffering injury **while he is employed** by **such** carrier in **such** commerce * * *"

The words in bold face are the new limiting words. They were held to save the statute when under attack on constitutional grounds in the Second Employers' Liability Act Cases, *Mondou v. New York etc. R. Co., etc.*, 223 US 1, 56 L ed 327.

In determining the coverage of the Act the question then "is not the constitutional power of Congress to extend the application of the Employers' Liability Act to operations less direct and immediate in their relation to interstate or foreign commerce. The question here is the meaning of the statute which it has chosen to adopt." (*Carey v. New York C. R. Co.*, 250 NY 345, 165 NE 805, 808 col. 2. Cf. cases in note 41 above. See pp. 77 ff; 83 below.)

The restrictions of the Act of 1908 are two. (1) The statute is restricted as to the persons to whom it applies,—it is restricted to an employer who is a "common carrier **by railroad**" (cf. note 47 above) and to its employee "while he is employed by **such** carrier". (2) It is restricted as to the activities of the persons who fall within the act,—it is restricted to such employer "**while engaging** in commerce between any of the states" and to the employee "**while** he is employed by such carrier **in such commerce.**"[51] We do not

51. Compare what Mr. Justice Holmes had said of possible construction of the Act of 1906, note 48 above.

suggest that the restriction as to activity is not also a restriction as to persons,—it is,—but we think that it leads to clarity in analysis, at least it helps our thinking, to separate the restrictions (a) as to persons and (b) as to activity.

**A. THE LIMITATIONS APPLY TO BOTH EMPLOYER AND EMPLOYEE**

Before taking up separately the meaning and effect of these limitations there should be considered decisions of this Court which apply to both. They established that before the Act can apply it must be shown that **both** the employee **and** the employer,—both the plaintiff and the defendant,—meet the prescribed tests. It is not enough that the employee is engaged in interstate commerce. He must be an employee of the sort of employer described by the Act.[51a] The defendant must be that sort of employer upon whom the Act fastens the responsibilities for which it provides; and doing the things described. Effect must be given to the words **"common carrier by railroad**[51b] **while** engaging in commerce between any of the several states" under the ordinary "rule that **all** words of the statute are to be taken into account and given effect if that can be done consistently with the plainly disclosed legislative intent." (*McDonald v. Thompson*, 305 US 263, 266, 83 L ed 164, 166; *United States v. Lexington etc. Co.*, 232 US 399, 410, 58 L ed 658, 662.)

Under the Act of 1908 notice was taken of the employer test in a number of cases although it was clear the employer-

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51a. The FELA in this respect is unlike the Fair Labor Standards Act under the terms of which application of the statute is decided by looking to the activity of the employee alone. *McLeod v. Threlkeld*, 319 US 491, 497, 87 L.ed 1538, 1543, 1544, *Mabee v. White Plains Pub. Co.*, 327 US 178, 184, 90 L.ed 607, 613.

51b. We have pointed out that they are new in the Act of 1908 (see note 47 above). The history of their appearance gives them added significance (see p. 33 ff above).

defendant was acting as a railroad and a common carrier so that attention was centered upon the other phases of the Act. But the proposition for which these cases stand is not restricted, as will appear below, to a test of engaging in interstate commerce.

The meaning and effect of the limitations in § 1 of the Act were first before this Court in 1913. *Pedersen v. Delaware etc. R. Co.*, 229 US 146, 150, 157 L ed 1125, 1127, said:

> "Considering the terms of the statute, there can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the **carrier** is engaged in interstate commerce, and where the employee is employed by the carrier in such commerce; * * * The true test always is: Is the work in question a part of the interstate commerce in which the **carrier** is engaged?"

In immediate sequence *St. Louis etc. R. Co. v. Seale*, 229 US 156, 158, 57 L ed 1129, 1133 said:

> "The real question, therefore, is, whether the Federal statute was applicable; and this turns upon whether the injuries which caused the death of the deceased were sustained while the **company** was engaged, and while he was employed by it, in interstate commerce."

*Shanks v. Delaware etc. R. Co.*, 239 US 556, 557, 60 L ed 436, 438, which first stated the definitive test of what is interstate commerce under the Act (see p. 49 below), said:

> "Thus it is essential to a right of recovery under the Act not only that the **carrier** be engaged in interstate commerce at the time of the injury, but also that the person suffering the injury be then employed by the carrier in such commerce. And so it results **where the carrier is also engaged in intrastate commerce, or in what is not commerce at all**, that one who, while employed therein by the carrier, suffers injury through its

negligence, or that of some of its officers, agents, or employees, must look for redress to the laws of the state wherein the injury occurred. * * *"

Accord:

*North Carolina R. Co. v. Zachary*, 232 US 248, 256, 58 L ed 591, 594;[52]

*Ill. C. R. Co. v. Behrens*, 233 US 473, 478, 58 L ed 1051, 1055;[53]

*Delaware etc. R. Co. v. Yurkonis*, 238 US 439, 59 L ed 1397 quoted in note 99 below.

A second proposition, applicable to both tests is that the inquiry must be as of a relevant time. The status of the parties is to be determined as of the time of injury. How they were acting or what they were doing at some different time can be of no consequence. The cases for this proposition will be found below under the discussion of interstate commerce (see p. 47 ff).

### B. LIMITED COVERAGE OF THE ACT AS TO PERSONS

**The employer** at whom the act is directed is the "common carrier by railroad". These words "as used in the Act, mean

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52. "In order to bring the case within the terms of the Federal Act, **defendant** must have been, at the time of the occurrence in question, engaged as a **common carrier** in interstate commerce, and plaintiff's intestate must have been employed by said **carrier** in such commerce."

53. The court quotes with approval the language from *Pedersen* which we have quoted in the body.

*Ill. C. R. Co. v. Rogers*, 221 Fed. 52, 54 (Circ. 5) held that an averment that "at the time of said accident the said railroad company was a common carrier by railroad, engaged in interstate commerce" was insufficient to show that the railroad was engaged as alleged **with respect to the activity in which the employee was engaged** when he was hurt. The averment could be true but the railroad so engaged elsewhere. Acc. *Tipton v. Atchison etc. Ry. Co.*, note 81 below.

one who operates a railroad as a means of carrying for the public, that is to say, a railroad company acting as a common carrier" and this construction "is in accord with the ordinary acceptation of the words" (*Wells Fargo & Co. v. Taylor*, 254 US 175, 187, 65 L ed 205, 213). With equal propriety the words mean only common carriers which carry by railroad. They do not describe an employer who is acting neither as a carrier nor as a common carrier nor as a railroad.

The Act does not apply to an employer who is neither a common carrier nor a railroad although engaged in work for a railroad which is essential to its operation, which the railroad itself, as to the public, is under duty to do, which it could do and which some railroads do for themselves. The Act does not apply in case of injury to an employee of an independent contractor who is maintaining the railroad's right of way (*Dougall v. Spokane etc. Co.*, 207 F2d 843 (Circ. 9), cert. den. 347 US 904, 98 L ed 1063)[54] or providing refrigerator cars and "protective service" for the shipment of perishables (*Gaulden v. So. Pac. Co.*, 78 F. Supp. 651 (N.D. Cal.), aff'd "on the grounds and for the reasons stated in the opinion of the trial court", 174 F2d 1022 (Circ. 9)[55].

The result is the same where the employer for his business uses railroad facility, or provides accessorial railroad service, as a common carrier, but is not acting as a railroad.

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54. Compare *Chicago etc. Ry. Co. v. Bond*, 240 US 449, 60 L.ed 735, holding that an individual under contract to furnish labor to handle coal, wood, cinders and sand for a railroad was not an employee but an independent contractor.

55. This Court has not had occasion to deal with the status of car service companies under the FELA but it has held that they are not common carriers by railroad under the Interstate Commerce Act. (*Ellis v. I. C. C.*, 237 US 434, 59 L.ed 1036; *U. S. ex rel. v. I. C. C.*, 265 US 292, 68 L.ed 1024; *U. S. v. Fruit Growers Exp. Co.*, 279 US 363, 73 L.ed 739.)

The FELA does not apply to an express carrier (*Wells Fargo & Co. v. Taylor*, 254 US 175, 65 L ed 205; *Jones v. N.Y.C.R. Co.*, 182 F2d 326 (Circ. 6), decided after the 1939 amendment) or to an employer providing sleeping cars or sleeping-car service (*Robinson v. B. & O. R. Co.*, 237 US 84, 59 L ed 849; *Taylor v. N.Y.C.R. Co.*, 294 NY 397, 62 NE2d 777, cert. den. 326 US 786, 90 L ed 477). These employers would have fallen within the Act of 1906 (see *Howard*, quoted p. 34 above) but effect must be given to the limiting words "by railroad" in the Act of 1908. (And cf. *United States ex. rel. v. I.C.C.*, 265 US 292, 297, 68 L ed 1024, 1027[56]). The liability is "imposed only on interstate carriers **by railroad**, although there are other interstate carriers" (*Mondou v. N.Y. etc. R. Co.*, 223 US 1, 53, 56 L ed 327, 347; cf. *Re Vaul v. So. Kan. Stage Lines Co.*, 150 Kan. 641, 95 P2d 541).

Finally the inquiry is not ended if it is found that the employer, as to **some** of its business, is a common carrier by railroad. It must be found to be such in the activity in which the injured man is employed. *Howard* (quoted p. 36 above) in arguing that the coverage of the Act of 1906 went beyond the power of Congress pointed out that the language was broad enough to cover the activity of an employer which, as to some of its business, was a common carrier when it had "shops * * * for construction work" and, indeed, was "engaged in other independent enterprises." *Shanks* (quoted p. 39 above) said the carrier might be engaged "in what is not commerce at all". A railroad, in connection with the construction of an extension may act as a carrier by

56. "If the Car Company is a carrier by railroad, it would seem to follow that sleeping car companies and express companies are likewise included within the words. Evidently, however, Congress did not think so, since § 209 of the act contains special provisions in respect of these companies, which would have been entirely unnecessary if they had been so included."

railroad but as a **private** carrier, not a common carrier. "In constructing, improving, or repairing its road, and in building its extensions and branches, the railroad company is providing facilities for its service as a common carrier, **but, of course, is not acting as such.** It may do the work itself, if it chooses, or it may make it the subject of contract with another."[57] (*Santa Fe etc. Ry. Co. v. Grant Bros. Const. Co.*, 228 US 177, 57 L ed 787.[58]) And *So. Pac. Co. v. Jensen*, 244 US 205, 213, 61 L ed 1086, 1097 held that this petitioner, a common carrier by railroad as to some of its business, did not fall within the FELA when it was acting as a common carrier by water, operating an off-shore vessel.[59] (Cf. *Nogueira v. N. Y. etc. Co.*, 281 US 128, 74 L ed 754;[60] *Buren v. So. Pac. Co.*, 50 F2d 407 (Circ. 9), cert. den. 284 US 638, 76 L ed 543;[60] *So. Ry. Co. v. Taylor*, 16 F2d 517 (Circ. Dist.

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57. "It is well settled by the authorities that the same person or corporation may be engaged in one line of business as a common carrier and in another line of business as a private carrier. (Citing cases.)" (*Chenery v. Employers' etc. Corp.*, 4 F2d 826, 827 (Circ. 9).

58. Action for loss of property being carried by the railroad. The railroad had employed a construction company, under contract, to do construction work on an extension and in the contract limited its liability for loss of property being carried by it for the contractor. Held, that the railroad was not acting as a common carrier and, by consequence, its contractual limitation of liability was valid.

59. The court noticed that the Act of 1906 had been held unconstitutional, that the Act of 1908 "is carefully limited" and after quoting the Act of 1908 said: "Evidently the purpose was to prescribe a rule applicable where the parties are engaging in something having direct and substantial connection with **railroad** operations; and **not with another kind of carriage** recognized as separate and distinct from transportation on land and no mere adjunct thereto." It was beyond question that both the employer and employee were engaged in interstate commerce. The employee was handling interstate freight.

60. In *Nogueira* the employee was a freight handler loading freight into cars on a float. In *Buren* the injured man was a brakeman handling brakes on freight cars about to be taken off a car ferry. The work and the injury in both was maritime and the Longshoremen's Act and not the FELA applied. Cf. *O'Rourke*, p. 94 below and note 129 below.

Col.), cert. den. 273 US 767, 71 L ed 882;[61] *Foley v. Hines*, 119 Me. 425, 111 Atl. 715, cert. den. 256 US 690, 65 L ed 1173[62]; *Hammill v. Penn. R. Co.*, 87 NJL 388, 94 Atl. 313, aff'd 88 NJL 717, 96 Atl. 292.[63]

**The words "employed" and "employee"** present no problem peculiar to the FELA or to railroads. There is no issue of employment here but for the sake of completeness this Court's holdings are briefly stated.

This court, in holding that a Pullman porter was not an employee of the railroad (*Robinson v. B. & O. R. Co.*, p. 43 above) said:

> "We are of the opinion that Congress used the words 'employee' and 'employed' in the statute in a natural sense, and intended to describe the conventional relation of employer and employee".[64]

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61. The plaintiff was injured while operating a passenger elevator in a railroad office building in the District of Columbia. The applicable statute, if it applied at all, was the Act of 1906 which was constitutional in the District of Columbia (see note 46 above). It was held not to apply because "the operator of an elevator in an office building is not a common carrier nor is he engaged in commerce. * * * In reaching our decision, **it is not a relevant matter of concern that the general business of defendant company is that of a common carrier,** and that its office building is used as the center from which the operation of its extensive system of railroads is directed and controlled."

62. Plaintiff, an employee of Portland Terminal Co. was injured while "trimming coal" in the hold of a vessel. The defendant owned and operated certain railroad property and also owned a wharf. It was immaterial that the coal had moved in interstate commerce on the vessel. "That steamer was not owned by the defendant, and formed no part of its system and the Federal Act applies only to 'a common carrier by railroad.'"

63. Pennsylvania Railroad Company was operating a canal as lessee. "The federal act does not apply, because by its terms it affects only common carriers by railway. It is true that the employer is a railroad company, but as such employer of deceased it was operating a canal and not a railroad."

64. This language was repeated in *Hull v. Philadelphia etc. Co.*, 252 US 475, 479, 64 L ed 670, 673. For a later Court of Appeals case see *Dougall v. Spokane etc. Ry. Co.*, 207 F2d 843, 846 (Cir. 9) cert. den. 347 US 904, 98 L ed 1063.

The holdings in the few cases which have come to this court[64a] are in harmony with the *Robinson Case*. A lessor railroad was held liable to the employee of the operating lessee but this was because local law established "the responsibility of the lessor for all acts of negligence of the lessee occurring in the conduct of business on the lessor's road" (*No. Car. R. Co. v. Zackary*, 232 US 248, 257, 58 L ed 591, 595). The usual test of right to control the way the work shall be done as well as the result to be accomplished (*Standard Oil Co. v. Anderson*, 212 US 215, 53 L ed 480) to make one an employee was applied to determine that a man who was killed was an independent contractor and not an employee (*Chicago etc. R. Co. v. Bond* 240 US 449, 60 L ed 735). Pullman porters (*Robinson v. B. & O. R. Co.*, p. 43 above) and express messengers (*Wells Fargo & Co. v. Taylor*, 254 US 175, 65 L ed 205) are not employees of the railroad although an express messenger if he actually did some railroad work might be its special employee while he was doing this work (see *Missouri etc. Ry. Co. v. West*, 232 US 682, 58 L ed 795) and by the same token a porter in the general employ of a railroad is not its employee while handling United States mail under the direction of a United States postal clerk (*Denton v. Yazoo etc. R. Co.*, 284 US 305, 76 L ed 310). A member of a road crew does not leave the service of his general employer and become an employee of another railroad over whose tracks his employer's trains are operated (*Hull v. Philadelphia etc. Co.*, 252 US 475, 64 L ed 670) but the crew of one railroad may be loaned to another railroad to do the latter's work and then become the employees of the railroad whose work they are doing (*Linstead v. C. & O. Ry. Co.*, 276 US 28, 72 L ed 453). The work need not be for com-

64a. Decisions of other courts are collected in a note in 30 ALR 2d 517.

pensation if the injured man is doing the work of the railroad at the request of an employee of the railroad who is authorized to get such assistance (*Baltimore etc. Co. v. Burtch*, 263 US 540, 68 L ed 433).

### C. LIMITED COVERAGE AS TO ACTIVITY

The employer is within the act only "**while engaging** in commerce between any of the several states"[65] and the employee within the Act of 1908 is only that employee "suffering injury while he is employed by **such** carrier in **such** commerce".

The fatal defect of the Act of 1906, upon which rested the holding of its unconstitutionality in *Howard*, was that it covered all employees of a common carrier which was engaged in interstate commerce (p. 34 above). The design of the limiting wording in the Act of 1908 was to eliminate this defect by providing that the Act should **not** apply to all employees (see p. 37 above). By consequence, and it has been so held consistently, "the mere fact of employment" by an employer such as the Act describes "does not bring such employees within the Act." (*New York etc. R. Co. v. Bezue*, 284 US 415, 419, 76 L ed 370, 374.)

An employee of a described carrier might do only local work. He might do only interstate work. But he might do one type of work at one time and the other type at another. The Act recognized this. It imported a time test—it applies only to the employee who is injured "while" employed in interstate commerce. (Cf. note 48 above.) For the Act to apply,

65. In the usual situation it is readily apparent that the employer is a railroad and a common carrier. If the employee, at the time he is injured, is in the course of his employment and is engaged in interstate commerce from this alone his employer is normally also so engaged. Because of this the opinions usually speak in terms of the work the employee was doing.

the employee must have been engaged in interstate commerce at the very time of injury.

"Giving to the words 'suffering injury **while** he was employed by such carrier in such commerce' their natural meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employee is engaged is a part of interstate commerce. * * * Here, at the time of the fatal injury, the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. * * * That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

*Ill. C. R. Co. v. Behrens*, 233 US 473, 478, 58 L ed 1051, 1055, and see note 77 below.

"What his employment was on other occasions is immaterial for, as before indicated, the Act refers to the service being rendered when the injury was suffered."

*Shanks v. Delaware etc. Co.*, 239 US 556, 558, 60 L ed 436, 438.

"So, also, as the question is with respect to the employment of the decedent at the time of the injury it is not important whether he has previously been engaged in interstate commerce, or that it was contemplated he would be so engaged after his immediate duty had been performed."

*Chicago etc. Co. v. Harrington*, 241 US 177, 179, 60 L ed 941, 942.

This rule was never questioned. Additional cases are cited below, at p. 53. It resulted that in some railroad service "during the same day, railroad employees often

and rapidly passed from one class of employment to another" (*N. Y. etc. R. Co. v. Carr*, 238 US 260, 262, 59 L ed 1298, 1299); "that the same employee of a railroad company may have different rights at different times is a familiar consequence of the application of different laws, as, for example, when the employee of a railroad company is engaged at one time in intrastate commerce and at another time, even on the same day, in interstate commerce" (*Nogueira v. N. Y. etc. R. Co.*, 281 US 128, 137, 74 L ed 754, 760). Modification of this rule was one of the objectives of the amendment of 1939 (see p. 66 below).

The other phase of the problem, what for the employer was "commerce between any of the several states" and what for the employee was employment "in **such** commerce" was more troublesome and productive of a considerable number of cases that reached this Court.

*Pedersen v. Delaware etc. Co.*, 229 US 146, 57 L ed 1125, the first case to present the question, held that carrying bolts to be used in repairing a bridge in use on a line carrying interstate trains fell within the Act. The Court framed the problem this way: "Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it?" It answered that "the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal effect a part of it." (See also note 94 below.) A little later *Shanks v. Delaware etc. R. Co.*, 239 US 556, 60 L ed 436 held that repairing a shaft in a machine shop did not fall within the Act and stated what became the definitive test:

> "Having in mind the **nature and usual course of the business** to which the Act relates and the evident purpose of Congress in adopting the Act, we think it speaks

of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion, (see *Swift & Co. v. United States*, 196 US 275, 398, 49 L ed 518, 525, 25 SCt 276), and that the true test of employment in such commerce in the sense intended is, was the employee at the time of the injury, engaged in interstate **transportation**, or in work so closely related to it as to be **practically a part of it?**"

Six years later in *Ind. Acc. Com. v. Davis*, 259 US 182, 187, 66 L ed 888, 892, this court again considered the test and adhered to the test of *Shanks* and stated the rationale:

> "The Federal Act gives redress only for injuries received in interstate commerce. But how determine the commerce? Commerce is movement, and the work and general repair shops of a railroad, and those employed in them, are accessories to that movement—indeed, are necessary to it; but so are all attached to the railroad company — official, clerical, or mechanical.[65a] Against such a broad generalization of relation we, however, may instantly pronounce, and successively against lesser ones, until we come to the **relation of the employment to the actual operation of the instrumentalities** for a distinction between commerce and no commerce. In other words, we are brought to a consideration of degrees, and the test declared, that the employee, at the time of the injury, must be engaged in interstate transportation or in work so closely related to it as to be practically a part of it, in order to displace state jurisdiction and make applicable the Federal Act."

The *Shanks* test was generally adhered to. In 1920, in *Erie R. Co. v. Collins*, 253 US 77, 64 L ed 790 and *Erie R. Co. v. Szary*, 253 US 86, 64 L ed 794, there was an inadvert-

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65a. Cf. *Reed v. Penn. R. Co.*, 227 F2d 810, 813 (Circ. 3), cert. gr., discussing the 1939 amendment to § 1.

ent departure. In 1931 and 1932 the subject was reexamined in 3 cases *Chicago etc. Ry. Co. v. Bolle*, 284 US 74, 76 L ed 173, *Chicago etc. R. Co. v. Ind. Com.*, 284 US 296; 76 L ed 304, which "definitely overruled" *Collins* and *Szary*; and *N. Y. etc. R. Co. v. Bezue*, 284 US 415; 76 L ed 370. *Bolle* reaffirmed *Shanks* and, after quoting so much of it as we have above, said (284 US at 78):

> "It will be observed that the word used in defining the test is 'transportation' not the word 'commerce.' The two words were not regarded as interchangeable, but as conveying different meanings. Commerce covers the whole field of which transportation is only a part; and the word of narrower significance was chosen understandingly and deliberately as the appropriate term. **The business of a railroad is not to carry on commerce generally. It is engaged in the transportation of persons and things in commerce**; and hence the test of whether an employee at the time of his injury is engaged in interstate commerce, within the meaning of the act, naturally must be whether he was engaged in interstate **transportation** or in work so closely related to such transportation as to be **practically a part of it.**"[66]

*Chicago etc. R. Co. v. Ind. Com.*, pointed out that the error discussed in *Bolle* had been made in *Collins* and *Szary*[67] and on this ground overruled them. *Bezue* restated the rationalization of *Ind. Acc. Com.*, p. 50 above, and said:

> "All work performed in railroad employment may, in a sense, be said to be necessary to the operation of

66. *Bolle* referred to a number of the cases which followed *Shanks* and said: "The applicable test thus firmly established is not to be shaken by the one or two decisions of this court where, inadvertently, the word 'commerce' has been employed instead of the word 'transportation.'"

67. It was said they inadvertently substituted "interstate commerce" for "interstate transportation".

the road. The business could not be conducted without repair shop employees, clerks,[67a] janitors, mechanics and those who operate all manner of appliances not directly or intimately concerned with interstate transportation as such, or with facilities actually used therein. But we have held that the mere fact of employment does not bring such employees within the Act."

This being the definitive test ("was the employee at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?") and its rationalization, adhered to after departure and reexamination, what was the result of its application in this Court?

Nothing could be closer to transportation by railroad than actual handling of vehicles of transportation,—it is the transportation. The Act applies to enginemen, trainmen and switchmen handling power and cars in the course of movement from state to state or carrying shipments in course of such movement in road service (*Mondou v. N. Y. etc. R. Co. and N. Pac. Ry. Co. v. Babcock*, 223 US 1, 56 L ed 327;[68] *Chicago etc. Ry. Co. v. Wright*, 239 US 548, 60 L ed 431;[69] *Ill. C. R. Co. v. Peery*, 242 US 292, 61 L ed 309;[70] *Seaboard A. L. R. Co. v. Duvall*, 225 US 477, 56 L ed 1171[71])

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67a. See, under the 1939 amendment, *Reed v. Penn. R. Co.*, 227 F2d 810 (Cir. 3), cert. gr.

68. The facts are those stated in the pleadings. In both cases it was alleged that the employee was a locomotive fireman, that the defendant was a common carrier by railroad engaged in interstate commerce and that the employee was employed by it in such commerce.

69. Deceased was the engineer of a road engine moving from one state to another to be repaired. "That the engine was not in commercial use, but merely on the way to a repair shop, is immaterial."

70. See note 76 below.

71. Baggageman and flagman on a passenger train running between states.

and switching service (*Seaboard A. L. Ry. v. Moore*, 228 US 433, 57 L ed 907;[72] *Grand Trunk W. Ry. Co. v. Lindsay*, 233 US 42, 58 L ed 838;[73] *Seaboard A. L. Ry. v. Koennecke*, 239 US 352, 60 L ed 324;[74] *Philadelphia & R. Ry. Co. v. Polk*, 256 US 332, 65 L ed 958[75]). The Act does not apply if the movement is wholly local,—if the movement is a separate and distinct movement between two points in the same state without crossing state lines, the freight or passengers being carried are not in course of an interstate journey and the movement is not for the purpose of facilitating part of an interstate movement. The test is the work being done at the time. It is immaterial what task was just completed or what the next task is. The rule is the same for road (*Ill. C. R. Co. v. Peery*, above,[76]) and switching service (*Ill. C. R. Co. v. Behrens*, 233 US 473, 58 L ed 1051;[77] *Chicago etc. R.*

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72. The train being switched was hauling 2 freight cars loaded with lumber in course of interstate shipment. The court correctly instructed that it was plaintiff's duty to prove that at the time he was injured he was engaged in interstate commerce.

73. Switching 4 loaded freight cars moving in interstate commerce. If the facts alleged show that the Act applies the Act need not be formerly invoked.

74. "The deceased was engaged in distributing the cars from an interstate train and clearing the track for another interstate train."

75. The draft being worked contained some local cars, others loaded with freight bound for points outside the state or from such points and one car passing through the state. A judgment affirming a state compensation award was reversed.

76. Plaintiff was a freight conductor working a turn-around between 2 points in Kentucky. On the trip out his train handled interstate cars. On the trip back it handled only local cars. He was hurt on the trip back. The Act did not apply,—"the trips out and back were distinct." The interstate character of the trip out did not carry over to the trip back.

77. Fireman on a switch engine. "The crew handled interstate and intrastate traffic indiscriminately, frequently moving both at once and at times turning directly from one to the other. At the time

*Co. v. Harrington*, 241 US 177, 60 L ed 941;[77] *Erie R. Co. v. Welsh*, 242 US 303, 61 L ed 319;[79] *Lehigh V. R. Co. v. Barlow*, 244 US 183, 61 L ed 1070;[80] *Tipton v. Atchison etc. Ry. Co.*, 298 US 141, 80 L ed 1091[81]).

The Act did apply to a switchman who had finished his shift and had started to leave the yard; he was "discharging a duty of his employment. Like his trip through the yard to his engine in the morning, it was a necessary incident of his

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of the collision the crew was moving several cars loaded with freight which was wholly intrastate, and upon completing that movement was to have gathered up and taken to other points several other cars as a step or link in their transportation to various destinations within and without the state." The Act did not apply. The court said that it entertained no doubt that Congress could have extended the Act to cover such situation but held that it had not done so. The work deceased was doing at the time "was not a service in interstate commerce * * *. That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

78. Cars containing coal for use in defendant's locomotives had moved to a storage track and, after being there for some time, were being switched to the coal shed. The movement to the storage track "had long since ended". This switching move was distinct and local. The Act did not apply. There was no "close or direct relation to interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use."

79. Plaintiff was a yard conductor employed in switching. The crew had placed an interstate freight car, spotted a caboose, stopped for water and returned to the yard office for further orders. Plaintiff was injured before he received these orders. The orders he would have received, had he not been injured, would have required him immediately to make up an interstate train. The Act did not apply. Cf. *Winters*, note 90 below; *Falcone*, note 87 below.

80. The facts are like those in *Harrington*, note 78 above, and that case was followed.

81. Action by a switchman based on violation of the Safety Acts (see note 36 above). A demurrer to the complaint was properly sustained because it failed to allege that he was engaged in interstate commerce. See note 53 above.

day's work, and partook of the character of that work as a whole, for it was no more an incident of one part than of another. His day's work was in both interstate and intrastate commerce * * *." (*Erie R. Co. v. Winfield*, 244 US 170, 61 L ed 1057.[82])

Work with equipment assigned to an interstate journey, necessary to the journey and immediately preceding it (*Norfolk & W. Ry. Co. v. Earnest*, 229 US 114, 57 L ed 1096,[83]), and servicing equipment in the course of an interstate journey (*N. Y. etc. R. Co. v. Walsh*, 223 US 1, 56 L ed 327[84]) or definitely assigned to such a journey as the next service (*N. Car. R. Co. v. Zachary*, 232 US 248, 58 L ed 591;[85] *Southern Ry. Co. v. Lloyd*, 239 US 496, 60 L ed 402;[86] *N. Y. C. R. Co. v. Marcone*, 281 US 345, 74 L ed 892[87]) are within the Act. But making heavy repairs on equipment

82. Compare *DiDonato*, note 92 below. These cases go far to explain the choice Congress made in the language and theory of the 1939 amendment that if **any part** of the employees' duty furthers or directly or closely and substantially affects interstate commerce the Act applies.

83. Plaintiff "was piloting a locomotive through several switches to a main track, where the locomotive was to be attached to an interstate train." Compare what was said in *Pedersen*, quoted in note 94 below.

84. Deceased was replacing a draw bar on a car then in use in interstate commerce.

85. Deceased was a fireman. After inspecting, oiling, firing and preparing a locomotive for an interstate trip he left his engine and was going to his boarding house on a personal errand. The temporary absence was not such that he was no longer "on duty".

86. An engineer was operating a locomotive on a sidetrack and oiling and inspecting it. It was alleged that the locomotive was used exclusively in interstate commerce; there was evidence to support the claim and the issue was properly left to the jury.

87. Deceased was a grease monkey servicing a locomotive in a roundhouse. The locomotive "was used in hauling interstate trains. It was not withdrawn from service." Even if deceased had finished his work his "presence on the premises was so closely associated with his employment in interstate commerce as to be an incident of it". Cf. *Welsh*, 242 US 303, 61 L ed 319, note 79 above.

withdrawn from service for repairs is not within the Act (*Ind. Ave. Com. v. Davis*, 259 US 182, 66 L ed 888;[88] *N. Y. etc. R. Co. v. Beeue*, 284 US 415, 76 L ed 370[89]). And the same is true of work of repair on a locomotive used in interstate and intrastate service but, at the time, not "destined especially for anything more definite than such business as it might be needed for." (*Minneapolis etc. R. Co. v. Winters*, 242 US 353, 61 L ed 358[90])

Work which directly facilitates interstate movements, either in immediate association with them or keeping the line open for them, is so closely related to them as to be practically a part of them. A road brakeman, doing way switching, was setting handbrakes to tie down 2 intrastate cars which had been switched out of a train containing interstate cars in order that the interstate train might proceed. The Act applied. (*N. Y. etc. R. Co. v. Carr*, 238 US 260, 59 L ed 1298.) Switching local cars to clear the way for immediate spotting, or reaching and moving, an interstate car falls under Act.[91] (*Penn. Co. v. Donat*, 239 US 50, 60 L ed 139;

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88. The injured man was working upon an engine which had been employed in interstate commerce and would be so employed again. It came in the shop for a "general overhaul" on December 1, 1918. The work was not completed until February 25, 1919. It was said that "the tracks, bridges and roadbed and equipment in actual use, may be said to have definite character, and give it to those employed upon them. But equipment out of use, withdrawn for a period, may or may not partake of that character, according to circumstances".

89. See this case quoted in part at p. 51 above. Whether the Act applied "must be decided not by reference to the kind of plant in which 'plaintiff' worked or the character of labor he usually performed, but by determining whether the locomotive in question was, at the time of the accident, in use in interstate transportation or had been taken out of it."

90. "An engine as such, is not permanently devoted to any kind of traffic * * *. It simply had finished some interstate business and had not yet begun upon any other." Cf. *Welsh*, note 79 above.

91. See *Koennecke*, note 74 above.

*Louisville & N. R. Co. v. Parker*, 242 US 13, 61 L ed 119) Clearing wreckage from a track so that interstate cars may move over it (*Southern Ry. Co. v. Puckett*, 244 US 571, 61 L ed 1321) and, for the same purpose, clearing snow from between a track and a platform (*N. Y. C. R. Co. v. Porter*, 249 US 168, 63 L ed 536) and clearing away dirt which had been dumped for filling under a trestle (*Kinzell v. Chicago etc. Ry. Co.*, 250 US 130, 63 L ed 893) are within the Act. Analogous, and leading to the same result, is the service of a "crossing watchman" at a public crossing,—"his employment concerned both kinds of trains" (*Philadelphia & R. Ry. Co. v. DiDonato*, 256 US 327, 65 L ed 955).[92]

Less directly connected with the actual movement of interstate cars but directly connected with and essential to their orderly movement was the work of yard clerks who recorded their movement. The clerks were under the Act when their work was in connection with interstate cars. (*St. Louis etc. Ry. Co. v. Seale*, 229 US 156, 57 L ed 1129; *Pecos etc. Ry. Co. v. Rosenbloom*, 240 US 439, 60 L ed 730)

Tracks and bridges, and the power line for an electric railroad, are as essential to interstate transportation by railroad as the wheels of power units and cars. When devoted to interstate transportation they are so devoted permanently and take character from that transportation even though they are also used for purely local movements.[93] The work of maintaining and repairing them is so closely related to the interstate transportation, of which they are a part, as to be practically a part of it. The Act applies. (*Pedersen v. Delaware etc. R. Co.*, 229 US 146, 57

92. Compare *Winfield*, 244 US 170, 61 L ed 1057, p. 55 above. See note 82 above.

93. Cf. *Winfield*, 244 US 170, 61 L ed 1057, p. 55 above, and *DiDonato*, 256 US 327, 65 L ed 955, just above.

L ed 1125;[94] *N. Y. C. R. Co. v. Winfield*, 244 US 147, 61 L ed 1045;[95] *Philadelphia etc. R. Co. v. Smith*, 250 US 101, 63 L ed 869;[96] *So. Pac. Co. v. Ind. Acc. Com.*, 251 US 259, 64 L ed 259.[97])

*Pedersen*, just above, is not only the leading case for the proposition just noticed, but is a leading case on this whole subject (see p. 49 ff above). It was careful to distin-

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94. The case is briefly stated and quoted at p. 49 above. The point was made that plaintiff was not actually working on the bridge but merely carrying to the place where the work was to be done some of the materials to be used. This Court said: "We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from a roundhouse to the track on which are the cars he is to haul in interstate commerce." See note 83 above.

95. Plaintiff was a laborer assisting in the repair of the main track and tamping cross ties. Cf. *Puckett* and similar cases, p. 57 above.

96. Plaintiff's principal duties were taking care of a camp car used by a bridge gang who were employed in the repair of bridges and cooking meals for the gang. He was injured while cooking. The Act was held so to apply because the work of the bridge carpenters was in effect a part of interstate transportation and plaintiff's work had the object and effect "of forwarding their work by permitting them to conduct it conveniently at points remote from their homes"; he "actually was assisting, the work of the bridge carpenters by keeping their bed and board close to their place of work * * * and forwarding their work by reducing the time lost in going to and from their meals and their lodging place." This case goes as far as any of the cases and its holding has been questioned in view of *Chicago etc. Ry. Co. v. Bolle*, 284 US 74, 76 L ed 173 and other cases presently to be dealt with. (*McLeod v. Threlkeld*, 319 US 491, 496, 87 L ed 1538, 1543.)

97. Deceased was a lineman. The railroad operated a power house where it generated electric current for electrically operated cars in interstate and intrastate commerce. From here the current was transmitted by main cables to trolley wires and the cars. Deceased was engaged in work "on one of the main lines necessary to keep it in serviceable condition." This court reversed a judgment which affirmed an award under the California Workmen's Compensation Act.

guish the maintenance work before it from **new construction and manufacturing**:[98]

> "Of course, we are not here concerned with the **construction** of **tracks**, bridges, engines, or **cars** which have not as yet become instrumentalities in such [interstate] commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."

The court must have been mindful that *Howard*, p. 36 above, had given as an illustration of "matters wholly independent of interstate commerce" a road "having shops * * * for construction work" and that less than two months before its decision in *Pedersen* it had said in *Santa Fe etc. Ry. Co. v. Grant Bro's Const. Co.*, 228 US 177, 186, 57 L ed 787, 792 (see p. 44 above):

> "In constructing, improving, or repairing its road, and in building its extension and branches, the railroad company is providing facilities for its service as a common carrier, but, of course, is not acting as such."

When the question directly presented itself the court applied the distinction made in *Pedersen*. In *Raymond v. Chicago etc. Ry. Co.*, 243 US 43, 61 L ed 583, the railroad

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98. For cases from other fields holding that mining, manufacturing, generation of electric power and erection of a bridge are not commerce see *United Mine Workers v. Coronado Coal Co.*, 259 US 344, 407, 66 Led 975, 994; *Carter v. Carter Coal Co.*, 298 US 238, 298, 80 Led 1160, 1182; *Crescent Cotton Oil Co. v. Mississippi*, 257 US 129, 66 Led 166; *U. S. v. Darby*, 312 US 100, 113, 85 Led 609, 616; *Utah Power & L. Co. v. Pfost*, 286 US 165, 179, 76 Led 1038, 1045; *Kansas City S. S. Co. v. Arkansas*, 269 US 148, 70 Led 204.

Compare *Grant Smith-Porter Ship Co. v. Rohde*, 257 US 469, 66 Led 321. Plaintiff was injured while working on **construction** of a partly completed vessel launched and lying in navigable waters. Held, that "neither Rohde's general employment, nor his activities at the time, had any direct relation to navigation or commerce." **Repair** of a completed vessel is to be distinguished. (*Baizley Iron Works v. Span*, 281 US 222, 74 Led 819).

was cutting a new tunnel to shorten its main line. Raymond was injured while working in the tunnel. The Act did not apply: "Raymond **and the railway company** were not engaged in interstate commerce at the time"; the State Compensation Act applied "even although it be conceded that the railroad company was, in a general sense, engaged in interstate commerce". Accord, *N. Y. C. R. Co. v. White*, 243 US 188, 61 L ed 667, decided the same day. The deceased "was a night watchman, charged with the duty of guarding tools and materials intended to be used in the construction of a new station and new tracks upon a line of interstate railroad."

> "The admitted fact that the new station and tracks were designed for use, when finished, in interstate commerce, does not bring the case within the Federal act. * * * Decedent's work bore **no direct** relation to interstate transportation, had to do solely with construction work, which is clearly distinguishable, as was pointed out in *Pedersen v. Delaware, L. & W. R. Co.* * * *".

The court refers to *Harrington*, p. 61 below and *Raymond*, decided that day. Accord: *Minn. etc. R. Co. v. Nash*, 242 US 617, 61 L ed 531, memorandum opinion reversing 131 Minn. 166 and 495, 154 NW 957 and 155 NW 1102.

Finally the Act was held not to apply to acquiring and storing essential supplies for future use, preparing them for use and maintaining and repairing structures and buildings for the general service of the railroad but not part of the line itself and so not part of transportation on it. The Act did not apply in the following situations: mining coal for use in locomotives in interstate commerce (*Delaware etc. R. Co. v. Yurkonis*, 238 US 439, 59 L ed 1397[99]), taking

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99. "The mere fact that the coal might or was intended to be used in the conduct of interstate commerce after the same was mined

down and putting in a new location a countershaft in a machine shop operated for repairing locomotives (*Shanks v. Delaware etc. R. Co.*, 239 US 556, 60 L ed 436), switching coal to a coal shed, where it was to be placed in bins or chutes and supplied, as needed, to locomotives of all classes (*Chicago etc. R. Co. v. Harrington*, 241 US 177, 60 L ed 941 followed on similar facts, in *Lehigh V. R. Co. v. Barlow*, 244 US 183, 61 L ed 1079), starting an engine to pump water into a tank for supplying locomotives (*Erie R. Co. v. Collins*, 253 US 77, 64 L ed 790[100]), drying sand for use in locomotives (*Erie R. Co. v. Szary*, 253 US 86, 64 L ed, 794[100]), taking coal on a locomotive used to generate steam to heat a passenger depot, baggage room, structures used for general railroad purposes, suburban passenger coaches waiting to go into service, quarters occupied by maintenance-of-way personnel and, sometimes, to prevent freezing of a turntable (*Chicago etc. R. Co. v. Bolle*, 284 US 74, 76 L ed 173), and oiling a motor used to hoist coal into a chute from which it would be supplied to locomotives principally employed in moving interstate freight (*Chicago etc. R. Co. v. Ind. Com.*, 284 US 296, 76 L ed 304).

## V. Application of the Act Does Not Necessarily Benefit the Employee.

If the Federal Employers' Liability Act does not apply the employee is not now remitted to the common-law remedy

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and transported did not make the injury one received by the plaintiff while he was engaged in interstate commerce. The injury happening when plaintiff was preparing to mine the coal was not an injury happening in interstate commerce, and **the defendant was not then carrying on interstate commerce**—facts essential to recovery under the employers' liability act.

100. These cases held that the Act applied but *Chicago etc. R. Co. v. Ind. Com.* "definitely overruled" them (see p. 51 above) because of an inadvertent error, pointed out in *Bolle* (see p. 51 above), and held that *Harrington* furnished the correct rule.

of another age with the defenses of the fellow-servant rule, contributory negligence and assumption of risk. "It is not amiss to point out that plaintiff is not without redress for his injury. The benefits of the Workmen's Compensation Act of California are available to him." (*Gaulden v. So. Pac. Co.*, 78 F Supp. 651 (N.D. Cal.) affirmed "on the grounds and for the reasons" stated by the trial court, 174 F2d 1022 (Circ. 9). Cf. *Reed v. Penn. R. Co.*, 227 F2d 810, 813 (Circ. 3), cert. gr.)

Upon the other hand, application of the Federal Act and consequent exclusion of any remedy under state law (see p. 28 above) depends **only** upon whether the employer and the employee meet the descriptive tests of the Federal Act and **not** at all upon whether there was negligence on the part of the employer and an award of damages can be made under the Federal Act (*N. Y. C. R. Co. v. Winfield*, 244 US 147, 61 L ed 1045;[100a] *So. Pac. Co. v. Ind. Acc. Com.*, 19 C2d 271, 280, 120 P2d 880; *Copley v. Ind. Acc. Com.*, 19 C2d 287, 120 P2d 879, cert. den. 316 US 678, 86 L ed 1752). The Federal Act may deprive the injured man of **all** relief. Unlike compensation statutes which provide for compensation for industrial injuries regardless of fault and require a showing only that the injury was suffered on the job, the Federal Act requires that the workman prove that negligence of his **employer** was a proximate cause of his injury. If the Act applies and he cannot make this proof, he alone must bear the full loss. (*Seaboard A. L. R. Co. v. Horton*, 233 US 492, 501, 58 L ed 1062; *Missouri P. R. Co. v. Aeby*, 275 US 426, 72 L ed 351; *B. & O. R. Co. v. Berry*, 286 US 272, 76 L ed 1099; *Delaware etc. R. Co. v. Korke*, 279 US 7, 73 L ed 578). This is as true after the 1939 amendment as before (*Brady v. South-*

100a. The holding is summarized in *Northern Coal & Dock Co. v. Strand*, 278 US 142, 147, 73 L.ed 232, 235.

*ern Ry. Co.*, 320 US 476, 88 L ed 239; *Hunter v. Texas E. Ry. Co.*, 332 US 827, 92 L ed 402; *Eckenrode v. Penn R. Co.*, 335 US 329, 93 L ed 41; *Wilkerson v. McCarthy*, 336 US 53, 93 L ed 497; *Reynolds v. Atl. C.L.R. Co.*, 336 US 207, 93 L ed 618; *Moore v. C. & O. Ry. Co.*, 340 US 573, 95 L ed 547; *Reed v. Penn. R. Co.*, 227 F2d 810, 813 (Cir. 3), cert. gr.). He cannot invoke the state statute which, but for the Federal Act, would provide him with compensation.[100b]

A latitudinarian construction of the Act is not necessarily a "liberal" construction. (And see further p. 87 ff below.)

## VI. The Amendment of 1939.

In 1939, against this background, the 76th Congress amended § 1 of the Act to broaden its application. It did this by reenacting the whole of § 1 as it then read and adding a new paragraph redefining the **employees** to whom the Act should apply (see p. 5 above). The Act of August 11, 1939, in this respect, was enacted as it was reported to the Senate by the Committee of the Judiciary. (See App. A)

Before the proposed amendment was reported to the Senate a significant change had been made in it after its introduction. As **reported and enacted** the new paragraph provided:

> "Any employee of a carrier, any part of whose duties as such employee shall be the **furtherance** of interstate

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100b. The flat statement of the rule, as we have made it, need not be softened because of the exceptional situation dealt with in *So. Buffalo Ry. Co. v. Ahern*, 344 US 367, 97 Led 395. The New York statute, unlike the California statute, expressly permitted use of the state machinery if the parties waived rights under federal statutes. They did and proceeded before the state board until the statute of limitations barred action under the FELA. The railroad then urged that the remedies of and procedure under the federal statute (including the bar of its limitation provision) occupied the field to the exclusion of the state statute and its procedures. It was held that it was too late for the railroad to shift its hold.

or foreign commerce; or shall, in any way **directly or closely and substantially,** affect such commerce"

shall be considered as employed in such commerce. It had read, after the semicolon, "or shall, **in any way,** affect such commerce". In Committee this was changed to read: "or shall, in any way **directly or closely and substantially,** affect such commerce".[100c]

The change is restrictive. To "in any way affect interstate commerce" covers a wider field than affecting such commerce "directly or closely **and** substantially".[101] The change to this more restrictive form of wording must be accorded significance. All talk in Congress is not appropriate for consideration "but the reports of a committee, including the bill as introduced, **changes made in the frame of the bill in the course of its passage,** and statements made by the committee chairman in charge of it, stand upon a different footing, and may be resorted to under proper qualifications

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100c. We take this from *Reed v. Penn. R. Co.*, 227 F2d 810 (Circ. 3) and *Ermin v. Penn. R. Co.*, 36 F Supp 936, 940 (E.D. N.Y.). The change was made at the suggestion of Senator Austin. Both cases quote Senator Austin, *Ermin* as follows:

> "Now on page 2, lines 18 and 19, occur the words 'or in any way'. Unless I am convinced I ought not to do that for some good reason, I think I will move to substitute for those words that occur and recur in many cases of recent date as defining what kind of effect on interstate is comprehended by the commerce clause of the Constitution. Those are the words, 'directly, closely and substantially'. I would substitute those words for the words 'or in any way' ".
>
> "My amendment was to substitute for the words 'or in any way' the words 'directly, closely and substantially'. That is the law as it is interpreted by the Supreme Court of the United States in *National Labor Relations Board against Jones & Laughlin Steel Corporation* [301 US 1, 57 SCt 615, 81 L.ed 893, 108 ALR 1352]; in the Bituminous Coal Cultivation Act of 1935, in connection with N.R.A. Codes and in *Carter versus Carter Coal Co.*, and others [238 US 238, 56 SCt 855, 880 L.ed 1160]."

101. The extent of the restriction is discussed below.

(citing cases)." (*United States v. St. Paul etc. Ry. Co.*, 247 US 310, 318, 62 L ed 1130, 1134; *Fox v. Standard Oil Co.*, 294 US 87, 96, 79 L ed 780, 787; *Helvering v. Wood*, 309 US 344, 348, 84 L ed 796, 798; *Steiner v. Mitchell*, ... US ..., 100 L ed (Adv. Op. 237), Oct. Term, 1955, No. 22.)

The report of the Senate Committee on the Judiciary to the Senate on the bill, so far as it deals with the proposed amendment to § 1, is set out in full in Appendix A. It demonstrates that the congressional objective was modest. There was no intention to sweep the Act aside and substitute a new scheme. The only intention was to broaden its coverage within the general field of **interstate railroad operation.**[101a] After 30 years of experience "Congress while liberalizing its benefits, [did] not see fit to extend the scope of the statute beyond railroading in its true sense." (See *Gaulden v. So. Pac. Co.*, 78 F Supp 651, 657 (N.D. Cal.), aff'd for the reasons and on the grounds stated below, 174 F2d 1022 (Circ. 9).)

A suggestion that the application of the Act to **employers** be broadened was expressly rejected. The Senate report, after setting out the proposed amendments, says:

> "The bill as introduced was intended to broaden the application of the act to include express, freight forwarding, and sleeping-car companies. Upon the hearings it was clearly shown that there is neither necessity nor demand for the inclusion of these companies in

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101a. *Reed v. Penn. R. Co.*, 227 F2d 810, 811 (Circ. 3), cert. gr., citing "Hearings Before a Subcommittee of the Senate Committee on the Judiciary, 76th Cong., 1st Sess., on S.1708 at 8" said, speaking of the 1939 amendment to § 1 of the FELA: "Mr. T. J. McGrath, General Counsel for the Brotherhood of Railroad Trainmen, said in advocating its adoption: 'Now if this amendment that we propose is put into the act it will, to a very large extent, wipe out the obscurity and the difficulty that now exists in attempting to determine when a man is or is not engaged in interstate commerce. *Its application will be confined, of course, to the character of employees now covered by the present act* * * *.'" (Italics those of the Court.)

the act. Therefore, they have been excluded from the substitute."

The aim of the bill (and we deal with the report only as it touches our problem) was stated:

> "It broadens and clarifies the law in its application to **employees** who may be killed or injured while in the service of a **railroad** company engaged in interstate or foreign **commerce.**"

Dealing specifically with the proposed amendment to § 1 the report says:

> "This amendment is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions **employees** of common carriers who, while **ordinarily** engaged in the **transportation** of interstate commerce, may be, at the time of the injury, **temporarily** divorced therefrom and engaged in intrastate operations."

The report says that the Act had presented difficult questions, quotes *Shanks*, comments on the difficulty of proof which an employee will sometimes face and the failure, due to "uncertainty which exists in **borderline cases**", to obtain relief because of selection of the wrong remedy, and goes on:

> "**Railroad** men are frequently injured while **moving or working upon cars or engines** which have been **temporarily** withdrawn from interstate commerce and which were, just before or just after the injury, used in such commerce. In railroad **switching service**, particularly men may be engaged in interstate and intrastate commerce intermittently several times during a single tour of duty.[101b]
>
> "The adoption of the proposed amendment will, to a very large extent,[102] eliminate the necessity of deter-

101b. See *Carr* and *Nogueira*, p. 49 above.

102. Something less than "entirely".

mining whether an employee, at the very **instant of his injury** or death, was actually engaged in the movement of interstate traffic." If any part of the employee's duties **(at the time of his injury or death)** directly, closely, or substantially affected interstate or foreign commerce, the claimant would be considered entitled to the benefits of the act.

"The preponderance of service performed by railroad **transportation employees** is in interstate commerce. As to those who are constantly shifting from one class of service to another,[101b] the adoption of the amendment will provide uniform treatment in the event of injury or death while so employed."

*United States v. St. Paul etc. Ry. Co.*, quoted p. 64 above, is authority supporting the use of this report as an aid in construing the statute as amended.[102a] (See to the same effect *United States v. C. I. O.* quoted p. 32 above. Accord: *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 US 384, 394, 95 L ed 1035, 1047; *Western P. R. Corp. v. Western P. R. Co.*, 345 US 247, 252, 97 L ed 986, 991; *McLean v. United States*, 226 US 374, 380, 57 L ed 260, 263; *Binns v. United States*, 194 US 486, 495, 48 L ed 1087, 1090.) We venture to suggest that in view of the abundance of adjudications under the Act of 1908, and the variety of facts dealt with, the report is as significant for what it does **not** say as for what it says.

What Congress actually did confirms the statement of limited objectives of the Senate report. The form of the amendment has its own significance. While the aim was to enlarge the coverage of the act "this was achieved *not by changing the main section*, but by adding a new clause to it.

102a. Cases under the amendment have resorted to it repeatedly (e.g. *So. Pac. Co. v. I. A. C.*, 19 C2d 271, 120 P2d 880, note 122 below) though, with deference, it is not clear that they have fully understood its import.

The main section still left the test of liability that the employee be "employed by such carrier in such commerce." (*Holl v. So. Pac. Co.*, 71 F Supp 21, 23 (N.D. Cal.).) Congress is presumed to know the construction put upon, and the application of, one of its enactments, at least by this Court where there has been a long course of adjudication. In such circumstances, where a specific change is made and the statute is otherwise reenacted the course of adjudication "has become part of the warp and woof of the legislation" as reenacted. (*Francis v. So. Pac. Co.*, 333 US 445, 449, 92 L ed 798, 803; *United States v. So. Buffalo Ry. Co.*, 333 US 771, 774, 92 L ed 1077, 1080; *N.L.R.B. v. Gullett Gin Co.*, 340 US 361, 365, 95 L ed 337, 343; *Walling v. Halliburton etc. Co.*, 331 US 17, 25, 91 L ed 1312, 1318; *McFeely v. Com'r.* 296 US 102, 110, 80 L ed 83, 89; and see the cases collected in Appendix B "Opinions during the past decade resting upon the rule that the reenactment of a statute carries gloss of construction placed upon it by this court" to the opinion of Mr. Justice Frankfurter in *Com'r v. Church*, 335 US 632, 690, 93 L ed 288, 323.)

In determining what Congress did and what it intended "we therefore consider the congressional history of the Act, the situation with reference to which it was enacted, and the existing judicial precedents, with which Congress may be taken to have been familiar in at least a general way" (*District of Columbia v. Murphy*, 314 US 441, 449, 86 L ed 329, 334. Cf. *United States v. C.I.O.*, p. 32 above.) To the extent that there was no change the reenactment of § 1 "became a continuation" of the Act (*Bingaman v. Golden etc. Lines*, 297 US 626, 628, 80 L ed 928, 931) with the construction which this Court had put upon it.

Here there is no occasion to resort to speculation or presumption. The Senate report demonstrates that Congress knew the course of decision in this court.

What then did the amendment do?

This Court, dealing with a related statute, pointed out that the 1939 amendment "merely redefines for the purposes of the Federal Employers' Liability Act the scope of the words 'employee' to include certain persons not theretofore covered, because they were [illegible] directly engaged in interstate or foreign commerce" (*Desper v. Starved Rock Ferry Co.*, 342 US 187, 190, 96 L ed 205, 209.[103])

**There was no attempt to change the Act's definition of the employers covered,**—the employer must still be a common carrier by railroad while engaging in commerce between the states. (*Latskó v. Nat. Carloading Corp.*, 192 F2d 905, 909 (Circ. 6).[104]) Congress knew that the Act had been so construed and that, by consequence, express companies and car service companies were excluded from its operation (see p. 43 above.) A suggestion that they be included was rejected (see p. 65 above).[105] The result, as to the express business or

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103. Respondent operated boats on the Illinois River. In 1947 Desper had been employed by it as a boat operator. In March, 1948, he was engaged for the season to resume his operator's duties when the boats were put in the water. Before then he was put to conditioning the boats which were blocked up on land. While doing this work he was killed. The attempt was to maintain an action under the Jones Act. It was argued that the 1939 amendment to the Federal Employers' Liability Act extended the scope of the word "seaman" in the Jones Act to include those whose work substantially affected navigation. The court used the language we have quoted in the body in rejecting this contention. (Cf. note 98 above.)

104. "The Federal Employers' Liability Act was amended in 1939, but the description of an employer liable under the Act was not changed * * *." And compare *Gaulden*, p. 95 below, and the cases cited with it; note 130.

105. *Jones v. N. Y. C. R. Co.*, 182 F2d 326, 328 (Circ. 6) said: "The Act was amended in 1939 but no effort was then made to include express companies within its terms. We are therefore justified in concluding that the Wells Fargo case had legislative approval. *United States v. Elgin J. & E. Ry. Co.*, 298 US 492, 500, 56 SCt 841, 80 L ed 1300."

car service business, would not be different if the company acquired a railroad and operated it as a common carrier. If Southern Pacific undertook to act as an express carrier over the lines of other railroads it would not, as to that business, be a common carrier **by railroad**, or under the Act. There is nowhere any suggestion that any of the rules noticed at p. 43 ff above have been changed or that if an employer who, as to some of its business, is a common carrier by railroad goes into the business of carriage by water, or manufacturing or mining the Act applies to those activities. There was no intention to change, and there was no change of, the rule of *Jensen* (p. 44 above), *Raymond* (p. 59 above) or *Yurkonis* (p. 60 above). There was no intention to change the double test of the statute (p. 39 above) and the rule that **both** the employer and the employee must meet the separate statutory tests for them. This Court has held that even though the **employee** fitted every description of the statute, and met every test, the Act, as amended in 1939, did not apply if the **employer** was not the employer contemplated by the statute. (*Penn. R. Co. v. O'Rourke*, 344 US 334, 97 L. ed 367.)

O'Rourke was a "rail",—a "freight brakeman" in petitioner's yard at Jersey City.[106] His work was in making up trains. It included work on car floats. While releasing hand-brakes on cars so that they might be pulled from a float he was injured. The District Court denied relief. The Second Circuit reversed (194 F2d 612) holding that the FELA applied; that the service was railroading not maritime. This Court reversed. The reason was that the **employer** fell within the definition of employer under the Longshoremen's and Harbor Workers' Act rather than that of the FELA.

106. It is clear that part of his duties was land switching of interstate cars.

The problem cannot be answered [as the Supreme Court of California tried to answer it] by looking alone at the type of work it is the employee's duty to do and ignoring the situation, with respect to that work, of the employer.

> "We are clear, however, that emphasis of the nature of respondent's [employee's] duties here misses the mark. The statute [Longshoremen's Act] applies, by its own terms, to accidents on navigable waters when the **employer** has employees engaged in maritime service. * * * Besides § 902(4) is directed at the employer when it speaks of maritime employment, not at the work the employee is doing. * * * If, then, the accident occurs on navigable waters, the Act must apply if the injured longshoreman was there in furtherance of his employer's business, irrespective of whether he himself can be labeled 'maritime.' "

*O'Rourke* rests on *Noguera v. New York etc. R. Co.*, 281 US 128, 74 L ed 754 and *Burton v. So. Pac. Co.*, 50 F2d 407 (Circ. 9) cert. den. 284 US 638, 76 L ed 543. If it be said that the explanation of those cases is that the Longshoremen's Act is later in time than the FELA and to the extent of its coverage superseded the FELA, then the holding of *O'Rourke* must be that the reenactment of § 1 of the FELA, after the Longshoremen's Act, did **not** constitute an enlargement of the definition of the **employer** contemplated by the FELA even to cover a field formerly covered by it.

**Not only did the 1939 amendment not attempt an expanded definition of "railroad" but it did not attempt any new definition of commerce or interstate commerce.** It reenacted the first paragraph of § 1 with the judicial gloss that had been added to it. (See p. 68 above.) Express reference to the *Shanks* test in the Senate report (p. 66 above) demonstrates that Congress knew the settled construction of

the FELA (pp. 49-52 above) and that under the FELA interstate commerce was "interstate **transportation** or work so closely related to it as to be **practically a part of it.**" For the Act to apply the employer must still be a common carrier by railroad while engaging in interstate transportation, or in work so closely related to it as to be practically a part of it.

We submit, that what is interstate commerce as to the employee of a railroad must be determined in the same way so that the effect of the new paragraph added to § 1 is as if it read:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign **transportation**, or work so closely related to it as to be **practically a part of it**; or shall, in any way directly or closely and substantially, affect such **transportation or such work** shall be considered as being employed by such carrier in interstate commerce" etc.

Some things about the enlarged definition of "employee" are tolerably clear; others are not as easy of solution.

On the negative side: The amendment did not sweep under the coverage of the Act **all** employees of common carriers by railroad engaged in interstate commerce. The Senate report and the very form and wording make this clear. Had Congress wanted the wider sweep it would have been a simple matter. (See *Holl v. So. Pac. Co.*, 71 F. Supp. 21, 23 (N.D. Cal.)) The coverage of the Act as amended in 1939 is not as broad as that of the Act of 1906 (see p. 33 above and *Taylor v. Lamaghi Coal Co.*, 252 Mo. 1212, 181 SW 2d 536, 539). It still remains that the mere fact of employment is not the test. The line has been moved but it still must be drawn. The result now will be different but it is still necessary to employ the process employed in *Davis* (p. 50 above and *Bezue*, pp. 51, 52 above.

It is reasonably apparent that in limiting and restricting the new definition of employee Congress had two considerations in mind which not only were reasons for limiting the enlargement worked by the amendment but were reasons of such nature that they help to point out the limit. On the first place Congress was conscious of the limits of its power and must be presumed to have had in mind the infirmities of the Act of 1906. (See p. 33 ff above.) But in the second place, unlike the situation in 1906 and 1908 when there were no state compensation statutes, in 1939 there were comprehensive state statutory schemes dealing with injury in modern industry and providing for benefits **even where the employer was not at fault.** (State Workmen's Compensation Laws as of September 1950, Bulletin No. 125, U. S. Dept. of Labor, Bureau of Labor Standards, U. S. Gov't Printing Office, 1950.)[107] These statutes can operate even though the employer is engaged in interstate commerce (*N. Y. etc. Co. v. White*, 243 US 188, 61 L ed 667; *Raymond v. Chicago etc. R. Co.*, 243 US 43, 45, 61 L ed 583, 585; *Boston & M. R. Co. v. Ahlburg*, 285 US 234, 76 L ed 729). Congress had no intention of intruding unnecessarily into a field adequately covered. This is the reason it restricted itself to "railroaders." This is the reason that there was no demand or need to include express, freight forwarding and sleeping-car companies (see p. 65 above). The Act was to be broadened to cover employees "who, while ordinarily engaged in the **transportation** of interstate commerce, may be, at the time of injury, temporarily divorced therefrom" (p. 66 above), not to sweep away state compensation schemes but to simplify, if

107. That the States have not been backward is shown by the fact that compensation payment progressively increased from $385,619,000 in 1944 to $845,799,000 in 1953. (Statistical Abstract of the United States, 1955, 76 ed.; U. S. Bureau of the Census, Washington, D. C., p. 268; and see earlier editions for earlier years.)

possible, the matter or application of the Federal Act in the case of those employees to whom it had applied. (See note 101a above.) It was the "railroad **transportation** employees" who had a preponderance of their service in interstate commerce. (See Senate Report, App. A hereto and p. 67 above.) And when the 1939 amendment is compared with other statutes having wider coverage (see p. 77 ff below) it is worth bearing in mind that the latter deal with matters as to which the states did not have comprehensive schemes.

On the positive side some matters seem equally clear. The objectives desired were reached. The "evils" that had developed in operation under the Act of 1908 were eliminated. The amendment abolishes the moment of injury rule under which application of the Act was determined by the **work being done** at the moment of injury. (*Behrens*, p. 48 above, *Shanks*, p. 48 above, *Harrington*, p. 48 above and similar cases, p. 47 ff above). The test is now the general character of the employment,—the **duties** assigned at the moment of injury. (Cf. *Winfield*, p. 55 above and *DiDonato*, p. 57 above). The act has greater continuity of application. In the course of a single tour of duty a man does not now "often and rapidly" pass from one class of employment to another (see *Carr* and *Noguéira*, p. 49 above). Congress followed the suggestion of *Behrens* that liability of the carrier be tested by what the employee was doing "in the course of its general work * * * whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce" (233 US at 477, 58 L ed at 1054 col. 2) and that the character of the employment during a shift be fixed by the character of work of the shift as a whole, as was done with the crossing watchman DiDonato (p. 57 above) and men going to or coming from work (*Win-*

*field*, p. 55 above). The result was accomplished by making the test not the **work being done** at the moment of injury but the **duties assigned** at the moment of injury. This was accomplished by making the Act apply to employees "any **part** of whose duties * * * shall be the furtherance of interstate or foreign commerce" etc. In addition the place of the "borderline cases" (p. 50 ff) was clarified.

Men assigned generally to the handling of, and work upon, the vehicles of transportation, indiscriminately working with interstate and intrastate power and cars,—road crews, switching crews, and car men servicing and making running repairs on equipment then in use,—are, beyond question, now under the coverage of the Act whatever the character of their work at the moment of injury. Their duties include all of which part is interstate rolling equipment. The situation is one stated in the Senate report.

A step farther away are the men in back shops making heavy repairs on cars and power withdrawn from service for that purpose. The equipment is only withdrawn temporarily; such work "directly or closely and substantially" affects interstate commerce. (*Baizley Iron Works v. Span*, 281 US 222, 74 L ed 819.)[108] Where the equipment has been dedicated to the general service of the carrier, and will be returned to that service, a rule that it should take character from the general service to which it is dedicated is not far from the holding as to the bridge in *Pedersen*, pp. 49, 57 above. The difference is in the physical necessities dictating the way in which the work of repairs must be done rather than

108. Held, that repair work on a vessel which had steamed to port for necessary repairs "has direct relation to navigation or commerce" as opposed to work on a vessel not yet completed which does **not** have "any direct relation to navigation or commerce." (*Grant Smith-Porter Ship Co. v. Rohde*, 257 US 469, 66 L ed 321. And see *Sultan Ry. & T. Co. v. Dept. of Labor*, 277 US 135, 72 L ed 820.)

in the contribution made by the work of repair to furthering interstate transportation. This is another situation specified in the Senate report.

Still farther removed from the actual transportation and work that is practically a part of it is work with structures and devices not part of the main line such as depots, loading platforms and equipment, water towers, fuel oil tanks, coal chutes, sand houses, engine houses, shops, etc. Depots and loading docks and equipment are instrumentalities of the interstate journey of passengers or the interstate movement of freight itself. The platform from which a passenger boards his car contributes as much to his interstate journey as the red cap who carries his bag. The loading crane makes a part of the actual interstate movement. The buildings and structures used to service the vehicles of transportation are farther removed but the service they provide is essential to the movement itself and so close to it that even before the 1939 amendment this Court had been led in *Collins* and *Szarn* (p. 50 above), mistakenly, it is true, as it later said, to include under the Act work in the service they provide. The cases were borderline cases spoken of in the Senate report.

The Senate report shows that Congress was concerned with work directly contributing to the movement of interstate vehicles, with applying the Act to men whose work, viewed as a whole, —whose duty in part,—was interstate transportation or practically a part of it, and with removing "the uncertainty which exists in border-line cases". Coverage of the cases we have just noticed seems fairly within the stated aims. The activities are all of a kind peculiar to railroading.

But when we go beyond these and the other activities which had been held to fall within the Act before the 1939 amendment we are in areas not peculiar to carriers or

railroads, which do not further the transportation itself or "directly or closely and substantially" affect it and which, indeed, are not commerce in any sense. So the purchasing and stockpiling of supplies not earmarked for any definite use,[109] which could, as readily, be procured and held for possible railroad use by some independent business entity, and which may never be put to railroad use. (See p. 60 above.) Still farther away are manufacturing and new construction which, classically, are not commerce at all. If they affect transportation they affect it only remotely (cf. *Grant Smith-Porter Ship Co. v. Rohde*, note 198 above); no more "directly or closely and substantially" than the manufacture of any article which, ultimately, may move in interstate commerce or be used in interstate commerce or the building of a highway bridge over which a motorist from some other state may drive. (See p. 82 ff below.) We are in areas not traditionally part of railroading and are dealing with things which a railroad can do for itself or as readily have done by someone else. (Cf. *Donagall v. Spokane etc. Co.*, 207 F2d 843 (Circ 9), cert. den. 347 US 904, 98 L ed 1063.)

The conclusion suggested by placing § 1 in its historical and practical setting, is fortified by comparison of the deliberately selected restrictive language of the amendment (see p. 63 ff above) with the language of other federal statutes and by an analysis of the language of the 1939 amendment itself.

The National Labor Relations Act (of July 5, 1935, c. 372, 49 Stat. 449 (29 USC § 151 ff)) in § 10 (29 USC § 160) con-

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109. Cf. *Diamond Match Co. v. Ontonagon*, 188 US 82, 47 Led 394; *Am. Steel & Wire Co. v. Speed*, 192 US 500, 48 Led 538; *General Oil Co. v. Crain*, 209 US 211, 52 Led 754; *Bacon v. Illinois*, 227 US 504, 57 Led 615; *Atl. C. L. R. Co. v. Standard Oil Co.*, 275 US 257, 72 Led 270; *Nashville etc. Ry. v. Wallace*, 288 US 249, 77 Led 730.

ferred on the Board powers to prevent unfair labor practices "affecting commerce" [without the limiting words directly or closely and substantially] and broadly defined "affecting commerce" to mean "in commerce or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce" (§ 2 (7); 29 USC § 152 (7)).[110]

The year before the 1939 amendment to the FELA was adopted Congress was wrestling with the problem of hours of work and minimum wages in industry generally. Its labors resulted in the Fair Labor Standards Act of 1938, Act of June 25, 1938, c. 676, 52 Stat. 1060 (29 USC § 201 ff). We are concerned only with the original act because the amendments after 1939 would not reflect upon the use of language by Congress in the 1939 amendment to the FELA. Congress, in the Fair Labor Standards Act, exercising its power under the commerce clause, wanted not only to reach industries and employees in interstate commerce but also industries and employees in activities which, though not interstate commerce, were within the reach of the commerce power as affecting interstate commerce sufficiently to be subject to regulation by Congress in aid of interstate commerce. Accordingly, Congress in its findings and statement of policy described the area to be reached as "industries engaged in commerce or **in the production of goods for commerce**" (§ 2, 29 USC § 202), provided that the administra-

110. Quoting the provisions of the statute which we have just quoted *N. L. R. B. v. Fainblatt*, 306 US 601, 607, 83 Led 1014, 1019 said: "The Act on its face thus evidences the intention of Congress to exercise whatever power is constitutionally given to it to regulate commerce by the adoption of measures for the prevention or control of certain specified acts—unfair labor practices—which provoke or tend to provoke strikes or labor disturbances affecting interstate commerce."

tor should appoint an industry committee "for each industry engaged in commerce or **in the production of goods for commerce**" (§ 5, 29 USC § 205), provided that every employer should pay to each of his employees "who is engaged in commerce or **in the production of goods for commerce**" specified minimum amounts (§ 6, 29 USC § 206) and specified that no employer should, except as provided, "employ any of his employees who is engaged in commerce or **in the production of goods for commerce**" for longer periods than specified (§ 7, 29 USC § 207).

When, then, in 1939, Congress amended the FELA it had before it its own recent distinction between engaging in commerce and manufacturing and distinguished between commerce upon the one hand and the manufacture of wheels and new freight cars, i.e. "the production of goods for commerce" upon the other hand.[11] We suggest that while, perhaps, the construction of a wholly new retarder yard is not the production of "goods", if regard is had for the subject being dealt with in the FELA and the way in which it was dealt with in the 1939 amendment, no distinction is

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111. The cases have consistently applied the FLSA to employees engaged in manufacturing not because they were engaged in interstate commerce but "in the production of goods for commerce". *Alstate Const. Co. v. Durkin*, 345 US 13, 97 Led 745; *Powell v. U. S. Cartridge Co.*, 339 US 497, 94 Led 1017; *Schulte v. Gangi*, 328 US 108, 90 Led 1114; *Mabee v. White Plains Pub. Co.*, 327 US 178, 90 Led 607; *Armour & Co. v. Wantock*, 323 US 126, 89 Led 118, reh. den. 323 US 118, 89 Led 649. And transportation must be distinguished from production of goods for commerce (*Western Union T. Co. v. Lenroot*, 323 US 490, 504, 89 Led 414, 424 col. 2).

So Aranda making new wheels and Gilco building new cars were not engaged in commerce but in the production of goods for commerce. But more to the point, **the same is true of Southern Pacific Company**. It was not a common carrier by railroad engaged in interstate commerce but **a manufacturer producing goods for commerce**.

to be made between this and the "production of goods" in the most restricted sense of that phrase.

There is assistance in the railroad field. The Adamson Law, establishing the 8-hour day, Act of Sept. 3, 5 1916, c. 436, 39 Stat. 721 (45 USC § 65) was restricted to employees "actually engaged in any capacity in the operation of trains used for the transportation of persons or property on railroad". The Hours of Service Act of Mar. 4, 1907, c. 2939, 34 Stat. 1415 (45 USC § 61) defined employees as "persons actually engaged in or connected with the movement of any train." In dealing with labor disputes and strikes, under the commerce clause, the reach of Congress is very long and Congress intended to employ its long reach. "Employee" was defined to include "every person in the service of a carrier" performing work "defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission" (Railway Labor Act of May 20, 1926, c. 347, § 1, 44 Stat. 577 as amended June 7, 1934, c. 426, 48 Stat. 926, June 21, 1934, c. 691, 48 Stat. 1185, June 25, 1936, c. 804, 49 Stat. 1921; 45 USC § 151)

With the history of construction of the FELA of 1908 and with the Hours of Service Act and Adamson Law before it Congress rejected the narrower definitions and enlarged the definition of the Act of 1908 as construed. But it just as deliberately rejected the inclusion of employees engaged in manufacturing and new construction, employees engaged in the production of goods for commerce and the sweepingly all-inclusive language of the Railway Labor Act (45 USC § 151).[112]

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112. The coverage of all federal statutes is not the same. They do not all cover the permissible area. When Congress wants to go beyond the confined area itself and reach intertwined activities it is explicit. (*Kirschbaum v. Walling*, 316 US 517, 522, 86 Led 1638, 1647.) In the 1939 amendment to the FELA it was explicit in staying very close to the area of the kind of interstate commerce railroads engage in, interstate transportation.

Analysis of the language that Congress did use in the amendment of 1939, looked at by itself, is of assistance. The critical words are "furtherance of interstate or foreign commerce, or shall, in any way directly or closely and substantially, affect such commerce".

In a different context and against a different background "furtherance of interstate or foreign commerce" might comprehend any employee who in any respect contributed to the business welfare of an employer whose business was interstate transportation by railroad. The context and background permit no such sweeping construction and, as in *Davis*, p. 50 above and *Bezue*, p. 51 above, this language must be restricted to something closer to the heart of the business and to the transportation itself.[113] This is confirmed by the very fact that the second critical clause "or shall, in any way directly or closely and substantially affect such commerce" was added. If "furtherance of interstate or foreign commerce" were to be given the widest latitude the words would permit, as applied to a railroad employer, the second clause was completely unnecessary. (*Reed v. Penn. R. Co.*, 227 F2d 810, 812 (Circ. 3), cert. gr.) The only conclusion is the contrary one, that Congress thought the expression had narrow meaning and that "in any way directly or closely and substantially" affecting interstate commerce reaches something different from and beyond mere furtherance of interstate commerce.

The problem comes down to a determination of the reach of the words "in any way directly or closely and substantially, affect such commerce." A critical view of this clause shows designed limitations. To affect "in any way" is

113. Cf. *Carter v. Carter Coal Co.*, 298 US 238, 307, 80 L.ed 1160, 1186; *A. L. A. Schecter P. Corp. v. U. S.*, 295 US 495, 546, 79 L.ed 1570, 1585.

broader than to affect "in any way directly or closely and substantially". And what appears from a reading of the language is confirmed by the history of the legislative course of the amendment (see p. 64 above). What, then, do these words mean?

The problem must be dealt with in terms of the cases now before the Court. We anticipate the Court will not depart from the established tradition of not attempting the statement of universal formulas supposedly capable of mechanical application or depart from the established technique of resolving the problem of connotation of general words used in a board and diversified field only by the process of inclusion and exclusion of cases as they arise.[114] Granted that the work these men were doing would remotely reflect itself in interstate transportation carried on by their employer, in the ordinary and natural sense of the words it did this neither directly nor closely **and** substantially. Here, with the use of the disjunctive, Congress is using "closely and substantially" as an alternative for and substantial equivalent of "directly". One expression throws light upon the other. And "directly affecting" interstate commerce, when the activity is manufacturing or new construction, is not an expression of new or uncertain meaning and excludes manufacturing and new construction.

It would be useless to attempt to go into all of the ramifications of the idea of direct effect on interstate commerce. It is sufficient here that this Court has never departed from view that manufacturing and road and similar construction are local, do not directly affect interstate commerce, and (in the absence of controlling federal legislation) fall with-

114. Cf. *Kidd v. Pearson*, 128 US 1, 16, 32 Led 346, 348; *John Baizley Iron Works v. Span*, 281 US 222, 230, 74 Led 819, 821; *Davis v. Dept. of Labor*, 317 US 249, 253, 87 Led 246, 248.

in the competency of the states [manufacturing and processing: *Kid v. Pearson*, 128 US 1, 23, 32 L ed 346, 351: *Crescent Cotton Oil Co. v. Mississippi*, 257 US 129, 66 L ed 166; *U. S. v. E. C. Knight Co.*, 156 US 1, 16, 39 L ed 325, 330: *Capital City Dairy Co. v. Ohio*, 183 US 238, 245, 46 L ed 171, 175; road construction: *Field v. Barber Asphalt Paving Co.*, 194 US 618, 48 L ed 1142). So, "the mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture is ordinarily an **indirect** and **remote** obstruction to that commerce." (*United etc. Union v. Herkert etc. Co.*, 265 US 457, 474, 68 L ed 1104, 1109: See note 98 above.)

It is of course true that any such test of the power of Congress to regulate commerce under the commerce clause has been abandoned, if it were ever adopted, and Congress can, in proper circumstances, regulate matters purely local in aid of its protection of interstate commerce (*U. S. v. Darby*, 312 US 100, 85 L ed 609; *Parker v. Brown*, 317 US 341, 359, 87 L ed 315, 330; *Wickard v. Filburn*, 317 US 111, 121, 87 L ed 122, 132[115]). But we are not here concerned with the power of Congress. "This case presents the narrow question of what Congress did, not what it could do." (*Federal Trade Commission v. Keppel Bros.*, 312 US 349, 355, 85 L ed 881, 885. See p. 39 above.) When the matter is one of statutory construction the nature of the activity as local is of significance. *Wickard* pointed out that though the activity may be manufacturing is not material in deciding a question

115. The change in view is not as to the relation of manufacturing to commerce, or of the adoption of any view that manufacturing is other than local (*Darby* makes this clear), but is the full development of the doctrine that the power of Congress to regulate interstate commerce is plenary and carries with it power to do whatever is necessary to make the exercise of the power over interstate commerce practically effective, including the regulation of purely local affairs where necessary.

of Federal power, "that an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it." (317 US at 124, 87 L ed at 135.) In our cases Congress expressed the intention not to reach manufacturing and new construction because it excluded activities which do not directly affect interstate commerce.

There are further different but related considerations to which this Court has given weight.

The work in which these 5 respondents were engaged was not peculiar to railroading. None of these men, in the ordinary course of his work, was subject to its peculiar hazards. Arapdas situation was not different from that of his opposite number in the Griffin Wheel Company. Gileo, Eufrazia and Eelk were doing the same things, in the same circumstances, as were Pullman Standard Car Manufacturing Company car builders. Moreno's conditions of work and changes of injury, negligent or non-negligent, were not different than if he had been employed by Morrison-Knudson who did the original grading (cf. *Dougall;* note 130, p. 95 below). There is nothing in the general policy or broad scheme of the FELA which is persuasive of withdrawing these men from the protection of the state compensation act and safety regulations and classifying them with men the core of whose work subjects them to the hazards of injury from moving railroad equipment. They are even less subject to these peculiar railroad hazards than the express messengers and sleeping-car porters whom Congress deliberately elected to exclude from coverage under the 1939 amendment (see p. 65 above).

The matter goes deeper. The FELA does not stand by itself. It is part only of a wider scheme dealing with railroad employee injuries. Both before and after it was adopted in 1908 Congress had concerned itself with the

safety of railroad workers in the so called Safety Acts (Acts of March 2, 1893, c. 196, 27 Stat. 531, March 2, 1903, c. 976, 32 Stat. 943 and April 14, 1910, c. 160, 36 Stat. 298; 45 U.S.C. §§ 1-16), the Ash Pan Act (of May 30, 1908, c. 225, 35 Stat. 476; 45 U.S.C. §§ 17-21) and the Boiler Inspection Act (of February 17, 1911, c. 103, 36 Stat. 913, June 7, 1924, c. 355, 43 Stat. 659 and March 4, 1915, c. 169, 38 Stat. 1192; 45 U.S.C. §§ 22-34). It is not only apparent from the provisions of these statutes considered apart that they all have the same purpose and design and deal generally with the same subject, the safety of railroad workers, but, for certain purposes at least, they are expressly related to the FELA by provisions of the latter Act. (§§ 3, 4, 45 USC §§ 53, 54.) These statutes are not only *in pari materia* (*B.&O. R. Co. v. Groeger*, 266 US 521, 528, 69 L ed 419, 424) but are so closely related that the Safety Acts and Boiler Inspection Act have been characterized by this Court as "substantially if not in form amendments to the Federal Employers Liability Act"; they are "supplemental to it, having the purpose and effect of facilitating employee recovery * * * The congressional purpose underlying the Boiler Inspection Act is basically the same as that underlying the Safety Appliance Acts and the Employers' Liability Act." (*Urie v. Thompson*, 337 US 163, 188 ff, 93 L ed 1282, 1302 ff.) Nor are these statutes unadorned. By § 5 of the Act of Mar. 2, 1893 (45 USC § 5), §3 of the Act of April 14, 1910 (45 USC § 12) and §5 of the Act of February 17, 1911 (45 USC § 28) Congress gave to the Interstate Commerce Commission the power by the adoption of rules, standards and instructions to make the application of the statutes more positive and effective,[116] *Urie* (337 US at 190, 93 L ed at 1304) put it this way:

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116. For example: Order under the Boiler Act requiring power operated reversing gear, initiated by the ICC, sustained. (*U. S. v. B. & O. R. Co.*, 293 US 454, 79 L.ed 587.) Order under the Safety Acts held to have the force of law. (*Atchison etc. Co. v. Scarlett*, 300 US 471, 81 L.ed 748.)

"Certain requirements of the Safety Appliance Acts, as for example the use of the automatic coupler, 45 USCA § 2, 10A FCA title 45, § 2, are made mandatory by express statutory language. Others, like those of the Boiler Inspection Act, simply outline a general standard which may be more specifically articulated in rules enunciated by the carriers subject to the approval of the Interstate Commerce Commission, 45 USCA § 28, 10A FCA title 45 § 28, or directly promulgated by the Commission, *Napier v. Atlantic Coast Line R. Co.*, 272, US 605, 611-613, 71 L ed 432, 438, 439, 47 S. Ct. 207, on the basis of proper findings. *United States v. Baltimore & O. R. Co.*, 293 US 454, 79 L ed 587, 55 S. Ct. 268. Violations of the Commission's rules are violations of the statute, giving rise not only to damage suits by those injured, *Lilly v. Grand Trunk Western R. Co.*, 317 US 481, 87 L ed 411, 63 S Ct. 347, supra, but also for money penalties recoverable by the United States. 45 USCA § 34, 10A FCA title 45, § 34."

The Interstate Commerce Commission has exercised the power delegated and under both the Safety Acts and the Boiler Inspection Act has adopted comprehensive and detailed rules, standards and instructions.

These statutes, and the I.C.C. rules and regulations, though they vary slightly in wording, apply to all common carriers engaged in interstate commerce by railroad and apply to all the described equipment of such carriers whether it is used in interstate commerce or intrastate commerce,—in this respect they are comprehensive. **But they apply only to rolling equipment,**—power units and cars. Their reach, in this regard, was not quite as long as the reach of the FELA of 1908 because they did not deal with protection of the employees engaged in maintenance and repair of the highway of commerce itself from the hazards of the work not arising out of the use or movement of rolling equipment, as for example, Pedersen. But the great

sources of injury to railroad workers were within their reach[117] and in some measure they paralleled the FELA and were part of its scheme. From the field covered, they excluded state regulation (*Napier v. Atlantic C. L. R. Co.*, 272 US 605, 71 L ed 432) so that within the field of their application the rules were uniform throughout the country, a workable result because the conditions dealt with were standardized. It is true that with the extended coverage of the FELA under the 1939 amendment the area within its reach and not within the reach of these other statutes has been expanded but it still remains that, **unless the coverage of the FELA is now unduly extended** they still cover the greatest source of injury—[118] and the whole federal scheme still has some unity. But the wider the extension of the FELA the greater are the gaps in coverage by safety orders.

But the states too, since 1908, have been concerned with the safety of workmen. They have not been satisfied to deal

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117. In Appendix B we set out accident data taken from tables in the 1954 report of the Interstate Commerce Commission, Bureau of Transport Economics and Statistics for the years 1930-1953.

About 95% of all deaths and well over 50% of all injuries to persons of all classes resulted from train operation accidents. (Table 1)

Over ⅔ of all deaths and since 1944 over 50% of all injuries to employees on duty resulted from train accidents. (Table 11)

In 1953 in the case of employees on duty 24.18% of the accidents resulting in death were nontrain and 44.81% of the injuries were nontrain and the remainder train. (Table 12)

The nontrain accidents are classified in Table 90.

118. When the coverage of the Act was enlarged to include enginemen, trainmen and switchmen although, at the moment of injury, they might not be engaged in interstate commerce it carried along with it into this field the Safety Acts and the Boiler Inspection Act.

**It did not carry these statutes to men in the back shops** making heavy repairs on power and cars withdrawn from service because of the wording of the statutes. For example the powerbrake provision is that it shall be unlawful for a carrier "to **use and employ** any locomotive engine" (45 USC § 1). The automatic coupler provision makes it unlawful for the carrier "to **haul or permit to be hauled or used on its lines** any car * * * not equipped with

with industrial injuries only by providing that compensation be paid when a man is hurt on the job. They have undertaken to promote safety in employment and to this end, sometimes by statutory provision, and sometimes by delegating the power to an appropriate administrative agency, they have laid down safety rules and standards for machinery and equipment and for conditions of work to promote the health and safety of the worker. California has done this. It has a comprehensive statutory scheme[119] fortified by extensive and detailed "orders"[120] adopted under the power conferred on the Division of Industrial Safety, the violation of which can lead to an award increased by one-half.[121] **These safety provisions and orders operate in the fields of work of railroad company employees not covered**

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couplers coupling automatically by impact" (45 USC § 2). Another provision is that it is unlawful "for any railroad company to use any car" not equipped with grabirons, etc. (45 USC § 4). The controlling provision of the Boiler Inspection Act makes it unlawful for any carrier "**to use or permit to be used on its line**" etc. (45 USC § 23).

The safety statutes have no provisions dealing with auxiliary facilities such as depots, loading docks and equipment, sand houses, water tower, interlocking towers, etc.

At the same time it excluded state safety regulations which had applied. See below.

119. The California Labor Code has general provisions imposing upon the employer the duty to see that the place of employment is made safe (§§ 6400-6406) and has special provisions covering construction of buildings (§§ 7100-7115), scaffolding (§§ 7150-7158), construction elevators (§§ 7200-7205), elevators (§§ 7300-7319) and tanks and boilers (§§ 7680-7692).

120. Outlined in Appendix C hereto.

121. The Division of Industrial Safety (referred to as division, § 6300) is given power to adopt general and special orders (§§ 6307, 6308, 6318, 6500 ff) and is given jurisdiction, among other things, over railroad shops (§ 6800). If an employer is guilty of serious and wilful misconduct any compensation award "shall be increased one-half" (§ 4553) and a knowing and wilful violation of a safety order constitutes such serious and wilful misconduct. (*Bethlehem Steel Co. v. I. A. C.*, 23 C2d 659, 145 P2d 583; *California Shipbuilding Corp. v. I. A. C.*, 27 C2d 536, 165 P2d 669; *California Shipbuilding Corp. v. I. A. C.*, 31 C2d 270, 188 P2d 27.)

**by the Safety Acts and Boiler Inspection Act.** But to the extent that the coverage of the FELA is extended their effectiveness is reduced. In addition compensation is payable under the California statute in the case of illness or disease, "occupational" or otherwise, "arising out of the employment" and the right to benefits in such cases, as in other cases, is not dependant upon a showing of negligence or other wrong doing.[122]

If it is now held that these men in manufacturing and new construction fall under the FELA the following will result:

1. The men have no rights under the state act and, in case of injury, can recover compensation only on proof of negligence of the employer which was a proximate cause of the injury (see p. 62 above) with the award subject to reduction in proportion to any negligence attributable to them (45 USC § 53).[123]

2. They will be deprived of any compensation for illness or disease arising out of the employment where

122. " 'Injury' includes any injury or disease arising out of the employment" (Lab. Cod. § 3208). This includes, of course, so called occupational diseases (*Colonial Ins. Co. v. I. A. C.*, 29 C2d 79, 172 P2d 884,—silicosis) but it is not restricted to such diseases and includes any illness or disease which has causal relation to the employment. It includes a disease peculiar to a region to which the employee is sent although his exposure to it is no greater than that of the residents of the area generally (*Pac. Emp. Ins. Co. v. I. A. C.*, 19 C2d 622, 122 P2d 570) and the aggravation of a prior heart condition although there was no unusual exertion (*Lumbermen's Mut. Cas. Co. v. I. A. C.*, 29 C2d 492, 175 P2d 823). For other examples of cases involving pre-existing conditions see *Pac. Indem. Co. v. I. A. C.*, 34 C2d 726, 214 P2d 530; *Fogarty v. Dept. Ind. Relations*, 206 Cal. 102, 273 P. 791; *Nat. Auto. etc. Co. v. I. A. C.*, 75 CA2d 677, 171 P2d 594 (hr. den. by Supreme Ct.); *Com. Cas. Ins. Co. v. I. A. C.*, 116 CA2d 901, 254 P2d 954 (hr. den. by Supreme Ct.); *Ass. Indem. Corp. v. I.A.C.*, 120 CA2d 423, 261 P2d 25.

123. As a partial defense it can never be eliminated by violation of state safety regulations and there can be no violation of any safety act since none applies. (See note 118 above)

no negligence of the employer can be shown (cf. note 122 above).

3. The various California safety provisions and orders will be completely without effect to increase the award in any amount in the event of knowing or wilful violation (see note 119 above) because the provision of the state statute for increase of the award in the event of serious and wilful misconduct can have no application. (*Chicago etc. Ry. Co. v. Devine*, 239 US 52, 60 L ed 140.)

4. The California safety provisions and orders will be robbed of effectiveness by being deprived of an important sanction, the imposition of a civil liability for their violation. Under the FELA negligence in the common-law sense must be proved without any aid from legislative acts except federal acts (which do not touch manufacturing or new construction). In a suit under the FELA state statutes are utterly without significance. Violation of them is meaningless and can not be shown.[124] (*Chesapeake & O. R. Co. v.*

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124. Under the FELA negligence means negligence in its common-law sense, unaffected by any rules of the state where the accident happened. "What constitutes negligence for the statute's purposes is a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws for other purposes. Federal decisional law formulating and applying the concept governs." (*Urie v. Thompson*, 337 US 163, 174, 93 L ed 1282, 1295.) This is but part of the broader rule that the application and effect of the statute is to be uniform throughout the country. (*Dice v. Akron etc. R. Co.*, 342 US 359, 361, 96 L ed 398, 403.) "The kind or amount of evidence required to establish" negligence under the Act "is not subject to the control of the several states." (*Chicago etc. R. Co. v. Coogan*, 271 US 472, 474, 70 L ed 1041, 1043), state statutes creating presumptions of negligence are inapplicable (*New Orleans etc. R. Co. v. Harris*, 247 US 367, 62 L ed 1167; *Yazoo etc. R. Co. v. Mullins*, 249 US 531, 63 L ed 754) and a state statute imposing a specific duty is wholly immaterial, "its violation has no bearing on the civil liability of a railway to its employees injured in interstate commerce, and that application of it" was error (*Chesapeake & O. R. Co. v. Stapleton*, 279 US 587, 73 L ed 861).

*Stapleton*, 279 U.S. 587, 73 L. ed. 861). The orders themselves have no penal sanctions and would be left as nothing but some proof in a prosecution for violation of the statute (Lab. Cod. § 6414). In this the men would have little interest since it had no bearing on their civil rights and the most active source of complaints and initiation of prosecutions would be gone. Since there are not and can not be any federal safety regulations in the field[125] (until Congress acts) the men will be very largely deprived of the benefits of safety rules, regulations and standards. It is submitted that Congress did not intend this result when it undertook to eliminate the moment of injury rule and the uncertainty in borderline cases in lines of work where it had in large measure provided safety regulations.

The effect here of excluding thoroughgoing state safety schemes by extending the FELA is new with the 1939 amendment. There was no problem in 1908 because there were no state compensation statutes and little by way of safety regulations.

5. There will be substituted for the simple and expeditious Commission procedure the slow, cumbersome and expensive common-law trial by jury method of resolving disputes.

If Congress, in a proper exercise of its powers, has dictated these results they must follow. But has it done so? If there is doubt should such an intention be imputed to it?

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125. There is no need to enlarge on the tremendous task it would be to work out a set of federal regulations to fit all the various activities in which a railroad might engage in the varying conditions in different parts of the country or argue out that this is not well suited to the peculiar competency of the I.C.C. because it is clear that in 1939 Congress did not have in mind any such attempt and the possibility could not reflect on what Congress intended by the 1939 amendment.

This court in *Federal Trade Commission v. Bunte Bros.*, p. 83 above, held "that in ascertaining the scope of congressional legislation a due regard for a proper adjustment of the local and national interests in our federal scheme must always be in the background" (312 US at 351, 85 L ed at 883). In making the appropriate adjustments, and in determining what Congress did in attempting to make the adjustment, what the state has done is not to be ignored. While it is manifest that enactment of a state statute "could not override the constitutional authority of the Federal Government" it is also true that in evaluating the situation "regard should be had to all the existing circumstances including the bearing and effect of any protective action to the same end already taken under state authority." (*Consolidated Edison Co. v. N.L.R.B.*, 305 US 197, 223, 83 L ed 126, 137.) In a closely related field this is exactly what has been done,—large regard has been paid to state workmen's compensation legislation. In wrestling with the very difficult problem of adjustment between state compensation acts and exclusive Federal authority in the maritime jurisdiction large regard has been paid to the protective measures taken by the states. (See *Davis v. Dept. of Labor*, 317 US 249, 87 L ed 246,[126] tracing the history of the attempts at adjustment and the difficulties encountered under *So. Pac. Co. v. Jensen*, 244 US 205, 61 L ed 1086 and permitting operation of a state compensation statute in a twilight zone that remains even after adoption of the Longshoremen's and Harbor Workers' Act, 33 USC § 901 ff. Cf. *Ahern*, note 100b, p. 63 above.)

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126. As this case, and the cases next to be dealt with show there is no hostility here or in Congress toward state compensation acts. The history of the attempts of Congress to deal with the problem presented by *Jensen*, briefly set out in *Davis v. Dept. of Labor*, shows that Congress first attempted a solution by legislation which would permit the state statutes to operate.

It is not without significance, then, in determining what Congress intended that California had a comprehensive labor code providing, for the 5 men whose cases are here, a comprehensive scheme of safety promotion and regulation and a comprehensive scheme of compensation for industrial injury unless their operation is excluded by the 1939 amendment of the FELA. In such circumstances "directly or closely and substantially" calls for no new, strange or strained construction. The phrase should be permitted to serve the purpose for which it was added. (See p. 64 above.)

From the twilight zone between maritime and land injury come two decisions which have decided bearing. They draw together the considerations just noticed. *Grant Smith-Porter Ship Co. v. Rohde*, 257 US 469, 66 L ed 321 held that an award could be made under a state compensation statute for a workman injured at work on new construction,—on a partially completed vessel lying in navigable waters,—because "neither Rohde's general employment, nor his activities at the time, had **any direct** relation to navigation or commerce." This case was followed in *Sultan Ry. & T. Co. v. Dept. of Labor*, 277 US 135, 72 L ed 820 where the work was booming logs on a navigable river and taking them from booms because "the employment, although maritime in character, pertains to local matters having **only an incidental** relation to navigation and commerce" and was distinguished in *John Baizley Iron Works v. Spun*, 281 US 222, 74 L ed 819 because there the work was work of repair on a completed vessel, the distinction we are urging, and heretofore established under the FELA, between repair and maintenance on one hand and manufacturing and new construction on the other.[127] Cf. *Hargington*, quoted in note 78 above.

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127. The same distinction was made and *Grant Smith-Porter Ship Co.*, above, followed in *Frankel v. Bethlehem-Fairfield Ship-*

But if we are wrong, and if the redefinition of "employee" has also served to disturb the concept of the employer who is engaging in commerce, settled by *Raymond* and *White*, pp. 59, 60 above, and not expressly tampered with by Congress, it can not be said that an employer manufacturing wheels and cars and building a wholly new retarder yard is acting as a common carrier or a carrier or a railroad.

## VII. Decisions Under the 1939 Amendment.

So far as we are aware there have been published opinions in 90 actions in which application of the Act as amended has been considered.[128] Most of them are not remarkable. We believe none warrants the holding below. We briefly review them and comment on the cases relied on by the Supreme Court of California.

Opinions in 7 cases deal with whether the Federal Employers' Liability Act or the Longshoremen's and Harbor Workers' Compensation Act applied to a maritime injury of a railroad worker. The question is now settled by *Penn. R. Co. v. O'Rourke*, 344 US 334, 97 L ed 367 that the Federal Employers' Liability Act does not apply.[129] (See p. 70 above)

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*yard*, 132 F2d 634 (Circ. 4), cert. den. 319 US 746, 87 L ed 1702 where the accident happened after adoption of the Jones Act (46 USC § 688). Cf. *Maryland Casualty Co. v. Toups*, 172 F2d 542 (Circ. 5), cert. den. 336 US 967, 93 L ed 1119.

128. This does not include the cases here under review or *Desper* or any cases after August 11, 1939 where the accident happened before August 11, 1939 the effective date of the amendment, or any cases holding that the 1939 Amendment did not apply retroactively to accidents which happened before it went into effect.

The date of the accident does not appear in the opinion in *Mastrandrea v. Penn. R. Co.*, 132 F2d 318 (Circ. 3). An examination of papers in that case, sent to us by the Clerk of the Court of Appeals for the Third Circuit, shows it happened on February 24, 1939. The District Court opinion (43 F Supp. 546) shows that the accident in *Lukon v. Penn. R. Co.*, 131 F2d 327 (Circ. 3) happened Nov. 16, 1938.

129. *Nogueira v. N. Y. etc. R. Co.*, 281 US 128, 74 L ed 754, held that the Longshoremen's Act (44 Stat. 1424, 33 USC § 901 ff) pro-

*Gaulden v. So. Pac. Co.*, 78 F Supp 691 (N.D. Cal.) aff'd 174 F2d 1022 (Circ. 9) on the grounds and for the reasons stated by the trial court, held that the FELA applied only to "railroading in its true sense" and not to supplying refrigerator cars and "protective service" and that a car service company was not a common carrier by railroad. It has been followed in other cases.[130]

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vided the exclusive remedy for a "railroad" employee moving freight by hand truck on a car float. It was followed in the case of a brakeman injured on a freight train ferry whose duty it was to set and release brakes and ride cars on and off the ferry in *Buren v. So. Pac. Co.*, 50 F2d 407 (Circ. 9), cert. den. 284 US 638, 76 L.ed.543. (See p. 70 above.) After the 1939 amendment of the Federal Employers' Liability Act the same result was reached in *Job v. Erie R. Co.*, 79 F Supp 698 (S.D. N.Y.), *Gussie v. Penn. R. Co.*, 1 NJ Super. 293, 64 A2d 244, cert. den. 338 US 869, 94 L.ed 533, and *Byrd v. N. Y. C. System*, 6 NJ Super. 568, 70 A2d 97. Then *Zientek v. Reading Co.*, 93 F Supp 875 (E.D. Penn.) held that the rule had been changed by the 1939 amendment of the FELA. The holding and reasoning were disapproved, and the court refused to follow, in *Rist v. Pittsburgh etc. Co.*, 104 F Supp 29 (N.D. Ohio) and *O'Rourke v. Penn. R. Co.*, 99 F Supp 506 (E.D. N.Y.). In *O'Rourke* the Court of Appeals for the Second Circuit reversed the District Court, 194 F2d 612. This court reversed the Court of Appeals. On the authority of that decision the Third Circuit reversed the District Court in *Zientek*, 220 F2d 183, cert. den. Oct. 10, 1955. *O'Rourke* was followed in *Scrinko v. Reading Co.*, 117 F Supp 603 (D.N.J.).

130. *Jones v. N. Y. C. R. Co.*, 182 F2d 326 (Circ. 6) express messenger; *Latsko v. Nat. Carloading Corp.*, 192 F2d 905 (Circ. 6), employee of a freight forwarder; summary judgment affirmed as to the freight forwarder upon the ground it was not a common carrier by railroad; denial of the motion of Erie R. Co. affirmed because there was an issue of fact whether its ownership of the stock and assets of National was a device to avoid liability so that § 5 of the Act applied; *Dougall v. Spokane etc. Ry. Co.*, 207 F2d 845 (Circ. 9), cert. den. 347 US 904, 98 L.ed 1063, employee of independent contractor doing work of maintenance and improvement on a railroad right-of-way; *Kelly v. Delaware etc. Com'n*, 85 F Supp 15 (E.D. Penn.), employee of independent painting contractor; *Moleton v. U. P. R. Co.*, 118 Utah 107, 219 P2d 1080, cert. den. 340 US 932, 95 L.ed 672, employee of P.F.E. the same car service company that was defendant in *Gaulden*.

*Cf. Downs v. B. & O. R. Co.*, 345 Ill. App. 118, 102 NE2d 537 holding that Downs was not an employee of an independent contractor but was an employee of the railroad.

Of the remaining 76 cases, 9 held that the Federal Employers' Liability Act did not apply (see note 131, below), 66 held that it did apply, and 1 that a disputed matter of fact should have been submitted to the jury (*Avance v. Thompson*, below). Most, but not all, of these cases are collected in 10 ALR2d 1279 and the supplements to that note.

The 9 cases which refused to apply the FELA are briefly reviewed in the footnote.[131] The only one close to our facts is *Moser v. U. P. R. Co.*, 65 Idaho 479, 147 P2d 336 holding that the Act did not apply to construction of a new yard. *Marcno*, here under review, is the only case contra.[132] No case has held that manufacturing falls under the Act.

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131. 3 of the 9 cases which refused to apply the statute did so because, while it was shown that the employer was a common carrier by railroad engaged in interstate commerce, it was not made to appear the employee had any connection with the interstate aspects of the business (*Shoenfelt v. Penn. R. Co.*, 69 F Supp 728 (S.D. N.Y.); *Hallaway v. Thompson*, 148 Tex. 471, 226 SW2d 816; *Harper v. Ill. C. R. Co.*, 66 F Supp 751 (W.D. Ky.)). *Holl v. So. Pac. Co.*, 71 F Supp 21 (N.D. Calif.) refused to apply the statute to a clerk in the freight claims department. *Reed v. Penn. R. Co.*, 227 F2d 810 (Circ. 3) held the Act did not apply to a file clerk. *Moser v. U. P. R. Co.*, 65 Ida. 479, 147 P2d 336, refused to apply the act to one engaged in the construction of new track in line with the distinction between maintenance and new construction established by *Pedersen v. Delaware etc. R. Co.*, 229 US 146, 57 L.ed 1125; *Raymond v. Chicago etc. Ry. Co.*, 243 US 43, 61 L.ed 583; *N.Y.C. R. Co. v. White*, 243 US 188, 61 L.ed 667; *Minn. etc. R. Co. v. Nash*, 242 US 617, 61 L.ed 531. *Thomson v. Ind. Com'n*, 380 Ill. 386, 44 NE2d 19, cert. den. 318 US 755, 87 L.ed 1129, declined to apply the statute to a railroad policeman where it did not appear that his duties, at the time, had any direct or substantial relation to the movement of interstate shipments. *Lawrence v. Rutland R. Co.*, 112 Vt. 523, 28 A2d 488, cert. den. 317 US 693, 87 L.ed 555, held the Act did not apply to one removing weeds from a right of way not for railroad purposes but to comply with a state statute under which, if the railroad did not clear the weeds, the town could and could then recover the costs from the railroad. *Boyleston v. So. Ry. Co.*, 211 SC 232, 44 SE 2d 537, declined to apply the federal statute to a laborer who loaded and unloaded. It appears to have been decided incorrectly. *Reed* is before this court on certiorari.

132. In *Wacaster* and *Agostina*, note 137 below, the holdings were put upon the ground the work was maintenance not new construction and they are not authority for the proposition that new construction was brought under the Act by the 1939 amendment.

Of the remaining cases 16 involved members of crews handling rolling equipment,—10 involved switching crews and 6 involved road crews. In 2 of the switching crew cases[133] and 4 of the road crew cases[134] the FELA would have applied before the 1939 amendment because the men were actually handling interstate equipment.[135] In the remaining cases[136] the crews handled interstate and intrastate cars

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133. *McCall v. Pitcairn*, 232 Iowa 867, 6 NW2d 415, 421; *Pritt v. West Virginia N. R. Co.*, 132 WVa 184, 51 SE2d 105, cert. den. 336 US 961, 93 L.ed 1113. (Spotting an empty assigned for loading and movement in interstate transportation. In view of this most of the discussion seems wholly unnecessary.)

134. *Avance v. Thompson*, 320 Ill App 406, 51 NE2d 334, 387 Ill 77, 55 NE2d 57, cert. den. 323 US 753, 89 L.ed 603 (sent back for a new trial to submit to the jury the question whether a specified car was an interstate car being handled by the crew); *L. & N. R. Co. v. Stephens*, 298 Ky 328, 182 SW2d 447 (handling interstate empties; in view of the holding in *Wright*, note 69 above, which is overlooked, the somewhat extended discussion was unnecessary); *Griffith v. Gardner*, 358 Mo 859, 217 SW2d 519 (claimed from time to time handled interstate shipments and records for the day in question destroyed; held that an inference unfavorable to the railroad arose); *Beam v. B. & O. R. Co.*, 77 Oh St 419, 68 NE2d 159, 163.

135. In *Ernhart v. Elgin etc. Co.*, 405 Ill 577, 92 NE2d 96, the court said that in 3 other cases, *L. & N. R. Co. v. Potts*, *Taylor v. Lumaghi Coal Co.*, and *Ford v. L. & N. R. Co.*, all cited in note 136 just below, interstate equipment was being handled at the moment of injury but we have not so classified these 3 cases because we do not so read them.

136. Switching crews: *So. Pac. Co. v. I. A. C.*, 19 C2d 281, 120 P2d 887; *Lewis v. I. A. C.*, 19 C2d 284, 120 P2d 886; *Ernhart v. Elgin etc. Co.*, 337 Ill App 56, 84 NE2d 868, 405 Ill 577, 92 NE2d 96; *L. & N. R. Co. v. Potts*, 178 Tenn 425, 158 SW2d 729; *Ermin v. Penn. R. Co.*, 36 F Supp 936 (E.D.N.Y.); *Kach v. Monessen etc. Co.*, 151 F2d 400 (Circ. 3) (the facts are clear enough on this point but it is open to serious question, to say the least, that the employer was a common carrier); *Rogers v. N. Y. etc. R. Co.*, 328 Ill App 123, 65 NE2d 243; *Murphy v. B. & M. R.*, 319 Mass 413, 65 NE2d 923 (interstate commerce "agreed or substantially admitted").

Road crews: *Taylor v. Lumaghi Coal Co.*, 252 Mo 1212, 181 SW2d 536 (road crew of an interstate train doing local switching unconnected with the train movement); *Ford v. L. & N. R. Co.*, 355 Mo 362, 196 SW2d 163.

indiscriminately and as a regular part of their duties. By its terms, since part of their duties was in interstate commerce, the Act applied. This class of case is one specially mentioned in the Senate report. (See p. 66 above.)

Twenty one were cases of men clearing and keeping open for traffic, maintaining, rehabilitating and repairing the highway of interstate commerce itself,—tracks, switches, bridges, etc.[137] Under *Pedersen v. Delaware etc. R. Co.*, 229

137. *Robinson v. Penn. R. Co.*, 214 F2d 798 (Cir. 3); *Copley v. L.A.C.*, 19 C2d 287, 120 P2d 879; cert. den. 316 US 678, 86 L ed 1752; *Prader v. Penn. R. Co.*, 113 Ind App 518, 49 NE2d 387; *Pigue v. Baldwin*, 154 Kan 708, 121 P2d 183; *Patsaw v. Kansas etc. Ry. Co.*, 56 F Supp 897 (W.D.La.); *Atl. C. L. R. Co. v. Meeks*, 30 Tenn App 529, 208 SW2d 355; cert. den. 333 US 827, 92 L ed 1112; *Gulf etc. Co. v. Waterhouse*, (Tex. Civ. App.), 223 SW2d 654; *Riley v. West Virginia etc. Co.*, 132 WVa 208, 51 SE2d 119, cert. den. 336 US 961, 92 L ed 1113; *Bailey v. Cent. Vt. R. Co.*, 113 Vt 433, 35 A2d 365; *Dillard v. Thompson*, 5 FRD 26; *Mo. Pac. R. Co. v. Fisher*, 206 Ark 705, 177 SW2d 725; *St. Louis etc. Ry. Co. v. Wacaster*, 210 Ark 1080, 199 SW2d 948; *Agostino v. Penn. R. Co.*, 50 F Supp 726 (E.D.N.Y.); *Skanks v. U. P. R. Co.*, 155 Kan 584, 127 P2d 431; *Rainwater v. Chicago etc. Co.*, 207 La 681, 21 S2d 872; *Brainard v. Atchison etc. Co.*, 87 F Supp 921 (D.Kan.); *Harris v. Mo. Pac. R. Co.*, 158 Kan 679, 149 P2d 342; *Armstrong v. Mo. etc. Co.*, (Tex. Civ. App.) 233 SW2d 942; *Walden v. Chicago etc. Ry. Co.*, 411 Ill 378, 104 NE2d 240; *B. & O. R. Co. v. Rodeheaver*, 197 Md. 632, 81 A2d 63; *Ericksen v. So. Pac. Co.*, 39 C2d 374, 246 P2d 642.

Few of these cases call for comment. We briefly note those that had any slightly unusual features. *Robinson* was resurfacing a highway traffic bridge over the railroad track. This seems as clearly within the Act as repair of a railroad bridge over an underpass (cf. *Pedersen*, above) or the work of a crossing watchman (*DiDonato*, p. 57 above). The other ground the court notices is highly questionable. *Prader*, a section hand was hurt when he was sent from the job to get a rule book. *Patsaw* was injured while going to the tool house for tools. *Meeks* was injured in a bunk car provided by the employer and though he was not working he was subject to call. In *Wacaster* a short section of main line was being double tracked and in *Agostino* new rail was being laid to shorten the line. In both cases the work was treated as maintenance of main line. In *Skanks*, *Rainwater* and *Brainard Cases* materials were being prepared for repair work to which they had been committed. In *Brainard* the work was that of assembling switches and frogs which were usually stock-piled

US 146, 57 L ed 1125 (p. 57 above), and *N. Y. C. R. Co. v. Porter*, 249 US 168, 63 L ed 536 these cases would have fallen under the Act before the 1939 amendment.[138]

Seven cases involved work on permanent structures, permanently committed to the general business of the railroad, both interstate and intrastate.[139] Such cases, before the 1939 amendment, were borderline cases, to say the least. (See p. 50 above and following.) Cases now holding that the broadened area of application of the Act includes such work hardly call for comment.[140]

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but the Court was careful to point out that the stock-pile had been exhausted and that at the time the employee was working on switches and frogs which would be shipped for immediate use. In *Harris* and *Armstrong* the work was cleaning up and policing generally the railroad premises. *Rodeheaver* was a flagman (cf. DiDonato, p. 57 above).

*Ericksen* was inspecting ties which were to be sent out on the line as replacements.

138. *Pedersen*, repair of bridge,—taking bolts or rivets to bridge to be used that night or next day on bridge.

139. *Jordan v. B. & O. R. Co.*, 135 WVa 183, 62 SE2d 806; *Great Northern Ry. Co. v. Ind. Com'n*, 245 Wis 375, 14 NW2d 152; *Scarborough v. Penn. R. Co.*, 154 Pa Super. 129, 35 A2d 603; *Zimmermann v. Scandrett*, 57 F Supp 799 (E.D. Wis.); *Wills v. Terminal R. Ass'n*, 239 Mo App 1144, 205 SW2d 942; *So. Pac. Co. v. Romine*, 75 Ariz 98, 251 P2d 908, cert. den. 345 US 970, 97 L ed 1387; *Downs v. B. & O. R. Co.*, 345 Ill App 118, 102 NE2d 537. In the *Scarborough Case* the plaintiff was doing a temporary job, installing a light in the station building. His regular work was that of a signal maintainer and, of course, part of his duties was maintenance of the main line system. *Romine* was a member of a B & B gang whose regular work was general building maintenance, especially main line bridges. The gang was on its way to complete an extension to a pump house. *Downs* was repairing ore unloading equipment.

140. The cases in the last two classes mentioned are to be distinguished from **new** construction. *Moser v. U. P. R. Co.*, 65 Ida 479, 147 P2d 336 held the Act, as amended, did not apply to new construction.

The Senate report states that one object of the amendment was to include borderline cases. (See p. 66 above.)

Eighteen cases were of employees engaged in servicing the equipment used to transport interstate shipments. In 2 of the cases[141] the locomotive was assigned to interstate work and before the 1939 amendment the Act would have applied.[142] But before the amendment it had been held that if equipment was withdrawn from service for repairs, etc., the Act did not apply. The remaining 16 cases in this class,[143] by reason of the 1939 amendment, now apply the Act. These cases represent an extension of the Act but an extension well within its terms and belong to a class picked out and specified in the Senate Committee report. It cannot be said of these cases that there is any unwarranted extension,—certainly part of the duties of these employees is the furtherance of interstate transportation. Rolling equipment committed to the general business of the railroad and used indiscriminately in interstate and intrastate com-

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141. *Williams v. Chicago etc. Ry. Co.*, 155 Kan 813, 130 P2d 596, and *Wright v. N. Y. C. R. Co.*, 263 App. Div 461, 33 NYS2d 531 aff'd 288 NY 719, 43 NE2d 97, cert. den. 317 US 668, 87 L ed 537.

142. *N. Y. C. R. Co. v. Marone*, 281 US 345, 74 L.ed 892; *Chicago etc. R. Co. v. Bower*, 241 US 470, 60 L.ed 1107; *B. & O. R. Co. v. Kast*, 299 Fed 419 (Circ. 6), cert. den. 266 US 613, 69 L.ed 468.

143. *So. Pac. Co. v. I. A. C.*, 19 C2d 271, 120 P2d 880 (the court was careful to point out that new cars were not built in the shop); *So. Pac. Co. v. I. A. C.*, 19 C2d 283, 120 P2d 888; *McFadden v. Penn. R. Co.*, 130 NJL 601, 34 A2d 221; *Maxie v. Gulf etc. Co.*, 356 Mo 642, 202 SW2d 904, 358 Mo 1100, 219 SW2d 322, cert. den. 338 US 823, 94 L ed 499; *So. Pac. Co. v. I. A. C.*, 88 CA2d 569, 199 P2d 364; *Trucco v. Erie R. Co.*, 353 Pa 320, 45 A2d 20, cert. den. 328 US 843, 90 L ed 1618; *Edwards v. B. & O. R. Co.*, (1942) 131 F2d 366 (Circ. 7); *Shelton v. Thomson*, 148 F2d 1 (Circ. 7,—crane operator in a shop using crane to lift wheels treated as "one who is engaged with others in the process of repairing cars"); *Skidmore v. B. & O. R. Co.*, 167 F2d 54 (Circ. 2); *Bretsky v. Lehigh V. R. Co.*, 156 F2d 594 (Circ. 2); *Baird v. N. Y. C. R. Co.*, 299 NY 213, 86 NE2d 567; *Wheeler v. Mo. etc. Co.* (Mo. App.) 205 SW2d 906; *Williams v. Chicago etc. Co.*, (1942) 155 Kan 813, 130 P2d 596; *Kordic v. Penn. R. Co.*, 46 Pa. D. & C. 607; *So. Pac. Co. v. Libbey*, 199 F2d 341 (Circ. 9), *Peresipka v. Elgin etc. R. Co.*, 217 F2d 182 (Circ. 7).

merce can hardly be distinguished from the highway of commerce itself, upon which it rolls, and permanent structures. (See p. 75 above.)

Two cases were of a clerk and watchman concerned with cars moving in interstate commerce.[144] Before the amendment they were under the Act when working with interstate cars.[145]

There are 3 other cases. *Ketlner v. Ind. Com.*, 258 Wis 615 46 NW2d 833 denied an award of compensation under the state statute for the death of a freight solicitor. *Straub v. Reading Co.*, 220 F2d 177 (Circ. 3) applied the FELA to an assistant chief timekeeper. He had supervisory duties which included seeing that men operating trains were properly paid and that the Hours of Service Act was not violated. He was said to be no mere clerk as in *Holl* (see note 131) and the court said "this is definitely a borderline case". (It so treated it in *Reed v. Penn. R. Co.*, 227 F2d 810 (Circ. 3).) These cases are open to serious question. *O'Donnell v. Penn. R. Co.*, 122 F Supp 899 (S.D. N.Y.) held that the employee could sue for damages resulting from negligence of a physician employed by the railroad. The case overlooks the fact that in supplying medical attention the employer is not acting as a common carrier or a railroad even if this can be classified as interstate commerce.

Of these cases the Supreme Court of California relied on 11:

*Ericksen v. So. Pac. Co.*, 39 C2d 374, 246 P2d 642, *Brainard v. Atchison etc. Co.*, 87 F Supp 921 (D. Kan.) and

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144. *Albright v. Penn. R. Co.*, 183 Md. 421, 37 A2d 870, cert. den. 323 US 735, 89 L ed 589 (checking seals and guarding shipments; cf. contra *Thomson v. Ind. Com'n*, 380 Ill 386, 44 NE2d 19, cert. den. 318 US 755, 87 L ed 1129—ejecting trespasser; see note 131 above); *Bowers v. Wabash R. Co.*, (Mo. App.) 246 SW2d 535 (handling interstate waybills).

145. *Seale*, p. 57 above and *Rosenbloom*, p. 57 above.

*Agostino v. Penn. R. Co.*, 50 F Supp 726 (D.C. N.Y.) (all cited in note 137 above) had to do with maintenance of the main line. *Agostino* was working on a section of 8,000 feet of track intended as a revision of the existing line which would shorten it by 670 feet, eliminate 5 curves and reduce grade. The case was determined by looking solely at the situation of the plaintiff[146] and treating the work as that of maintenance, **not** new construction.[147] *Brainard* was assembling switches and frogs then definitely earmarked for immediate shipment for use on the existing line, and the case was decided on the authority of *Pederson*, p. 57 above,[148] and *Ericksen* was inspecting ties and "some were immedi-

146. The court said: "The sole question presented—Was the plaintiff engaged in interstate commerce within the purview of the Federal Employers' Liability Act as amended by the act of Congress approved August 11, 1939?" It fails, entirely, to consider whether the employer was acting as a railroad or a carrier.

147. Whether the court was right or wrong in its classification of the facts it is clear that it was not deciding that new construction fell under the Act as amended. It said (p. 729): "The court is not required here to determine whether a person engaged in erecting a new project, intended to be used in interstate commerce, was engaged in interstate commerce, nor to determine whether or not a person working on a new project, such as the construction of a new railway, passenger station or freight house intended to be used in interstate commerce, is actually engaged in interstate commerce. Here the plaintiff was working on a revision of track alignment which was an improvement of the existing highway of interstate highway. * * * The conclusion seems inescapable that the construction work, while new, was only an improvement such as an extension, alteration, replacement or repair and, therefore, the plaintiff was engaged in interstate commerce." But was the employer acting as a railroad or a carrier?

148. The assembled switches and frogs were usually stockpiled at the rail mill. At the time Brainard was injured "the stockpile at defendant's rail mill was depleted * * * and it was necessary to ship such items immediately upon assembly to fill current requisitions." The court quotes from *Pederson*, and holds that Brainard's work was interstate commerce under the rationale of *Pederson*. If so the 1939 amendment had no bearing.

ately transported across state lines and placed in tracks carrying interstate commerce". Like *Pedersen* (p. 57 above) each seems to have been performing "a minor task which was essentially a part of the larger one" of maintenance of track then in use. That the task was performed at a distance from the point where maintenance of the line work itself was being done is of no consequence. The test is not geographical proximity but proximity in the series of steps to the finished job of track maintenance.

*Ermin v. Penn. R. Co.*, 36 F Supp 936 (E.D. N.Y.) and *Lewis v. I.A.C.*, 19 C2d 284, 120 P2d 886 (note 136 above) were actions brought by brakemen. The facts showed, beyond question, that they worked indiscriminately with interstate and intrastate equipment so that it would be immaterial, if that were the fact, whether at the moment of injury they were working only with intrastate equipment.

In *Wright v. N. Y. C. R. Co.*, 263 App Div 461, 33 NYS2d 531, aff'd 288 NY 719, 43 NE2d 97, cert. den. 317 US 668, 87 L ed 537, (note 141 above) plaintiff, acting as a boiler inspector, was making minor repairs on an interstate locomotive.[149]

In *Shelton v. Thomson*, 148 F2d 1 (Circ. 7),[150] *So. Pac. Co.*

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149. In *Baird v. N. Y. C. R. Co.*, 299 NY 213, 86 NE2d 567, 569 the court referred to its decision in *Wright*, treated that case as one of work on an interstate locomotive, or at least a case of a man whose work was ordinarily on interstate locomotives so that it was immaterial what he was doing at the precise moment of injury, and said: "Accordingly, it was not necessary in the *Wright Case*, supra, for us to decide the question we have before us here, that is, whether the repair of a locomotive ordinarily used in, but presently withdrawn from, interstate transportation brings the worker under the amended law."

150. A crane operator of a "crane being used to lift wheels and other supplies, which were in turn used in the repair of defendant's freight cars." He was characterized as "one who is engaged with others in the process of repairing the car".

*v. I.A.C.*, 19 C2d 283, 120 P2d 888, and *Trucco v. Erie R. Co.*, 353 Pa 320, 45 A2d 20,[151] cert. den. 328 US 843, 90 L ed 1618 (all cited in note 143 above) the men were making repairs on rolling equipment devoted, indiscriminately, to interstate and intrastate service and temporarily withdrawn from service. The cases fall into one of the classes specified in the Senate report. (See p. 100 above.)

In *Jordan v. B. & O. R. Co.*, 135 WVa 183, 62 SE2d 806[152] and *Wills v. Terminal R. Ass'n*, 239 Mo App 1144, 205 SW2d 942,[153] (both cited in note 139 above) the injured men were working upon adjuncts of structures permanently devoted to the general business of the railroad and present no exceptional features. (See p. 76 above.)

**VII. Mitchell v. C. W. Vollmer & Co., 349 US 427, 99 L ed 1196.**

*Mitchell* was a proceeding by the Secretary of Labor to enjoin asserted violations of the Fair Labor Standards Act (52 Stat 1060 as amended, 63 Stat 910, 29 USC § 201 ff). The work was construction of an earth embankment and concrete platform for a lock, a unit of the Gulf Intracoastal

151. Claimant was working in a blacksmith shop of the railroad making straphangers. The shop made repair parts for locomotives and the straphangers were used as replacement parts. He was making parts essential "for the repair and maintenance of defendant's locomotives" and, as in the cases of *Pedersen*, *Brainard* and *Ericksen* was engaged in a minor task which was simply part of the larger one.

152. A carpenter whose "work included repair of bridges, water tanks, coal houses, water stops, pump stations, roundhouses, laying tile, masonry and other labor connected with the maintenance of a railroad system." When injured he was working on a sewer for a roundhouse "to replace the old line".

153. A "sheet metal worker, * * * helping to install a pipe ventilator through the roof of a building used for forging iron parts, which iron parts were used in the repair of box-cars moving in interstate commerce."

Waterway. The lock was designed to furnish better passage into and across the Mississippi than was provided by the existing Harvey Lock and Canal. The question was whether those working on the lock were engaged in commerce within § 7 of the Act. The lock was designed to serve as an alternate route to the Harvey Lock and Canal. It was urged, on the authority of *Raymond v. Chicago etc. R. Co.*, 243 US 43, 61 L ed 583 (p. 59 above), that the workmen were not engaged in such commerce; that the lock was new construction. The majority said, speaking of *Raymond*:

> "We do not think that case should control this one. **We are dealing with a different Act of another vintage** —one that has been given a liberal construction from *A. B. Kirschbaum Co. v. Walling*, 316 US 517, 86 L ed 638, to *Alstate Constr. Co. v. Durkin*, 345 US 13, 97 L ed 745."

It was held that the Fair Labor Standards Act applied and that holdings under the FELA were to be distinguished.

In holding that *Raymond*, decided under another statute, was not necessarily controlling, and that what was commerce under one act was not necessarily the same as commerce under another, the court was proceeding in line with what it had said in *McLeod v. Threlkeld*, 319 US 491, 495, 87 L ed 1538, 1542, which it cites. *McLeod* had said:

> "There is no single concept of interstate commerce which can be applied to every federal statute regulating commerce."[154]

For this the court referred, in *McLeod*, to the *A. B. Kirschbaum Co. Case*, 316 US 517, 520, 86 L ed 1638, 1646 which is also cited in *Mitchell*.

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154. Dealing with an Act of Congress regulating interstate commerce and its meaning (as distinguished from the power of Congress) *Fed. Trade Com'n v. Bunte Bros.*, 312 US 349, 353, 85 L ed 881, 884 said: "Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business."

*Mitchell* carries no disapproval of *Murphey v. Reed*, but to the contrary also distinguishes that case by saying (note 2 to the *Mitchell* opinion):

> "The construction work held in *Murphey v. Reed*, 335 US 865, 93 L ed 410, not to be under the Act, was the building of a Navy Base, not the improvement of a facility or instrumentality of interstate commerce."

The cases now here are not under the Fair Labor Standards Act but are under the FELA under which *Raymond* was decided and under which, upon the authority of *Raymond*, the employer in manufacturing cars and wheels and constructing a new retarder yard was not engaged in commerce or in interstate commerce. And this is true even if to these activities the Fair Labor Standards Act applied (see the *A. B. Kirschbaum Case* at the place cited just above). *Mitchell* itself makes the controlling and authoritative distinction.

The distinction appears when the statutes are compared. In the light of the whole purpose and scheme of the Fair Labor Standards Act construction of a new lock, for a predetermined use as part of an interstate waterway in interstate commerce can, without a wrench, be assimilated to "production of goods for commerce",—it is production for commerce if not of "goods",—expressly covered by the Act. By the same token construction of a new retarder yard is to be assimilated to manufacture of cars and wheels,—production of goods,—which is just as clearly (and deliberately) **not** covered by FELA as inappropriate in an act regulating **railroading.**

But whether the employer, in the 5 cases at bar, in making wheels, building cars and constructing a new yard was engaged in commerce or interstate commerce and the work of the employees directly or closely and substantially affected

interstate commerce, the defendant-employer was not acting as a common carrier and was not acting as a railroad. Upon this *Mitchell v. Vollmer & Co.* in no way touches.

## CONCLUSION

These cases can be disposed of readily and shortly upon the ground that petitioner, the defendant-employer, was acting neither as a carrier nor as a railroad.

But there is a second ground of decision: The plaintiff-employees were not furthering, or directly or closely and substantially affecting, interstate commerce, i.e., interstate transportation or work so closely connected with it as to be practically a part of it. We suggest, with deference to the Court's usual policy of not going farther than is necessary to dispose of the case in hand, that this second ground should not be ignored and it is believed it must be considered in *Reed v. Pennsylvania Railroad Company* which is now before the Court.

The Federal Employers' Liability Act is one to which appeal is made constantly. In San Francisco alone, in state and federal courts, frequently as many as 5 or 6 FELA cases come to trial a week. In many the serious question is whether the federal or a state act applies. Administration of the federal Act has been left to the courts and, of necessity, the great bulk of the questions warranting review on appeal must be left to the United States Courts of Appeals and state courts of review. For them the problem, which act applies, will not be eliminated by a loose construction of "furtherance" of interstate commerce or "directly or closely and substantially" affecting such commerce. It will always be necessary to draw some line. No such simple solution of the problem of fixing the boundary between the field of the FELA and the field of the state compensation statutes can

be found as warrants ignoring that Congress deliberately elected to limit the Act as amended to employees, part of whose duties directly affects the instrumentalities of rail movement itself. With deference, the lower courts often seem not to have appreciated this; seem not to have appreciated that there are some real guides to the meaning of the Act; seem to have reached their results, not by rationalization of the statutory, juridical and factual elements involved, but by some sort of "intuitive" process, apparently satisfied that this is being "liberal" though it can serve to deprive an injured man, or the widow and children of one who has been killed, of any relief. It is believed that for their guidance an exposition, fuller perhaps, than is necessarily called for to dispose of these cases, is appropriate.

As to the cases in hand, it is respectfully submitted that the judgments of the Supreme Court of California must be reversed.

Dated at San Francisco, California, this 13th day of March, 1956.

ARTHUR B. DUNNE
HORACE B. WULFF
*Attorneys for Petitioner*
*Southern Pacific Company*

# APPENDIX A

**Calendar No. 712**

76TH CONGRESS—*1st Session*

SENATE

REPORT No. 661

AMENDING THE EMPLOYERS' LIABILITY ACT

JUNE 22, 1939.—ORDERED TO BE PRINTED

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Mr. NEELY, from the Committee on the Judiciary, submitted the following

## REPORT

[TO ACCOMPANY S. 1708]

In pursuance of an order of reference made by the Senate on the 6th day of March 1939, the Committee on the Judiciary have conducted hearings on Senate bill No. 1708, to amend section 51 of chapter 2, title 45, of the Code of Laws of the United States of America, and in the light of the hearings have adopted a substitute therefor and report the substitute with the recommendation that it be passed. The substitute, in which the proposed amendments to the existing law are in italics, is as follows:

A BILL To amend the Employers' Liability Act.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That sections 1, 4, and 6, chapter 149 (35 Stat. 65, Act of April 22, 1908), are hereby amended so as to read as follows:

"Section 1. That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and

Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parent; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"*Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth, shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases' (approved April 22, 1908), as the same has been or may hereafter be amended.*

[Here are set out other proposed amendments.]

The bill as introduced was intended to broaden the application of the act to include express, freight forwarding, and sleeping-car companies. Upon the hearings it was clearly shown that there is neither necessity nor demand for the inclusion of these companies in the act. Therefore, they have been excluded from the substitute.

## OBJECTIVES OF THE BILL

It is the aim of the bill to amend the Employers' Liability Act in three particulars:

1. It broadens and clarifies the law in its application to employees who may be killed or injured while in the service of a railroad company engaged in interstate or foreign commerce.

2. It abrogates the defense of assumption of risk in cases where injury or death is caused by the negligence of a carrier and makes the doctrine of comparative negligence applicable instead.

3. It prohibits the promulgation or enforcement of rules which penalize railroad employees for giving information concerning accidents to the injured person or his representative.

## AMENDMENT TO SECTION 1

This amendment is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers who, while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations.

The question whether an employee, at the time of his injury, is engaged in interstate or intrastate commerce is frequently difficult of determination. Under the rule laid down by the Supreme Court of the United States, an employee of a railroad company who may be injured must be found to have been engaged, at the time of the infliction of the injury, "in transportation or work so closely related to it as to be practically a part of it" (*Shanks v. D., L. & W. R. R.*, 239 U.S. 556).

In order to prove interstate transportation, if the question is at all obscure, it is necessary to procure the records of the carrier to show that the train, or the car upon which the employee was working, at the time of the injury, contained some commodity, which was being transported in interstate commerce, or, if the car be empty, it is necessary to prove by the records of the company that the car was then en route in an interstate movement.

As a result of the uncertainty which exists in border-line cases, there have been many instances in which suits were commenced and prosecuted to final determination only to develop the fact that the claimant had chosen the wrong remedy, or sued in the wrong court, and during the acquirement of this information the statute of limitations ran against the claimant under the law applicable to the case and no recovery could be had.

Railroad men are frequently injured while moving or working upon cars or engines which have been temporarily withdrawn from interstate commerce and which were, just before or just after the injury, used in such commerce. In railroad switching service particularly men may be engaged in interstate and intrastate commerce intermittently several times during a single tour of duty.

The adoption of the proposed amendment will to a very large extent, eliminate the necessity of determining whether an employee, at the very instant of his injury or death, was actually engaged in the movement of interstate traffic. If any part of the employee's duties (at the time of his injury or death) directly, closely, or substantially affected interstate or foreign commerce, the claimant would be considered entitled to the benefits of the act.

The preponderance of service performed by railroad transportation employees is in interstate commerce. As to

those who are constantly shifting from one class of service to another, the adoption of the amendment will provide uniform treatment in the event of injury or death while so employed.

[The remainder of the report deals with the other proposed amendments.]

# APPENDIX B

The following are taken from Accident Bulletin No. 122 of the Interstate Commerce Commission, Bureau of Transport Economics and Statistics, for the Calendar Year 1953.

Published by the Government Printing Office in 1954

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TABLE 1.—Casualties to persons of all classes, by kind of accident, years 1930-53.

| PERIOD | Number killed: In accidents in train operation | Number killed: In non-train accidents | Number killed: In all kinds of accidents |
|---|---|---|---|
| 1930-34 (av.) | 4,800 | 242 | 5,042 |
| 1935-39 (av.) | 4,725 | 218 | 4,943 |
| 1940-44 (av.) | 4,708 | 223 | 4,931 |
| 1946-50 (av.) | 3,621 | 179 | 3,800 |
| 1944 | 4,528 | 253 | 4,781 |
| 1945 | 4,465 | 226 | 4,691 |
| 1946 | 4,167 | 195 | 4,362 |
| 1947 | 3,944 | 221 | 4,165 |
| 1948 | 3,572 | 196 | 3,768 |
| 1949 | 3,163 | 144 | 3,307 |
| 1950 | 3,257 | 141 | 3,398 |
| 1951 | 3,207 | 151 | 3,358 |
| 1952 | 2,793 | 133 | 2,926 |
| 1953 | 2,805 | 125 | 2,930 |
| | **Number injured** | | |
| 1930-34 (av.) | 19,130 | 14,947 | 34,077 |
| 1935-39 (av.) | 17,569 | 13,401 | 30,970 |
| 1940-44 (av.) | 26,897 | 20,514 | 47,411 |
| 1946-50 (av.) | 25,300 | 16,552 | 41,852 |
| 1944 | 35,099 | 26,128 | 61,227 |
| 1945 | 35,769 | 25,712 | 61,481 |
| 1946 | 30,286 | 21,721 | 52,007 |
| 1947 | 25,698 | 17,393 | 43,091 |
| 1949 | 19,603 | 12,508 | 32,111 |
| 1950 | 21,769 | 11,486 | 33,255 |
| 1951 | 22,607 | 11,830 | 34,437 |
| 1952 | 19,216 | 10,770 | 29,986 |
| 1953 | 18,533 | 10,666 | 29,199 |

TABLE 11.—Casualties to employees on duty, by kind of accident, years 1930-53.

| PERIOD | Number killed | | |
|---|---|---|---|
| | In accidents in train operation | In non-train accidents | In all kinds of accidents |
| 1930-34 (av.) | 486 | 146 | 632 |
| 1935-39 (av.) | 446 | 128 | 574 |
| 1940-44 (av.) | 689 | 147 | 836 |
| 1946-50 (av.) | 423 | 119 | 542 |
| 1944 | 803 | 175 | 978 |
| 1945 | 736 | 156 | 892 |
| 1946 | 541 | 131 | 672 |
| 1947 | 547 | 162 | 709 |
| 1948 | 434 | 134 | 568 |
| 1949 | 321 | 82 | 403 |
| 1950 | 271 | 87 | 358 |
| 1951 | 311 | 84 | 395 |
| 1952 | 278 | 74 | 352 |
| 1953 | 232 | 74 | 306 |
| | Number injured | | |
| 1930-34 (av.) | 8,646 | 13,007 | 21,653 |
| 1935-39 (av.) | 7,576 | 11,417 | 18,993 |
| 1940-44 (av.) | 16,096 | 18,204 | 34,300 |
| 1946-50 (av.) | 15,490 | 14,266 | 29,756 |
| 1944 | 23,758 | 23,572 | 47,330 |
| 1945 | 24,295 | 22,990 | 47,285 |
| 1946 | 19,128 | 19,197 | 38,325 |
| 1947 | 18,535 | 17,197 | 35,732 |
| 1948 | 15,946 | 14,911 | 30,857 |
| 1949 | 11,628 | 10,476 | 22,104 |
| 1950 | 12,216 | 9,547 | 21,763 |
| 1951 | 13,564 | 9,779 | 23,343 |
| 1952 | 11,673 | 8,863 | 20,536 |
| 1953 | 10,699 | 8,686 | 19,385 |

TABLE 12.—Distribution of casualties to employees on duty, by kind of accident, year 1953.

| KIND OF ACCIDENT | Employees on duty — Killed — Number 1953 | Killed — Percent of total 1953 | Killed — Percent of total 1952 | Injured — Number 1953 | Injured — Percent of total 1953 | Injured — Percent of total 1952 |
|---|---|---|---|---|---|---|
| **TRAIN ACCIDENTS** | | | | | | |
| Collisions | 16 | 5.23 | 6.25 | 203 | 1.05 | 1.11 |
| Derailments | 20 | 6.54 | 4.55 | 201 | 1.04 | .90 |
| Locomotive-boiler accidents | 4 | 1.31 | 1.99 | 1 | .06 | .06 |
| Other locomotive accidents | — | — | — | — | — | — |
| **TRAIN-SERVICE ACCIDENTS** | | | | | | |
| Coupling or uncoupling: | | | | | | |
| Cars or locomotives | 7 | 2.29 | 2.56 | 541 | 2.79 | 2.55 |
| Air hose | 4 | 1.31 | 2.27 | 287 | 1.48 | 1.33 |
| Operating locomotives | 1 | .33 | .85 | 548 | 2.83 | 3.50 |
| Operating hand brakes | 2 | .65 | 1.70 | 840 | [illegible] | 4.05 |
| Operating switches | — | — | — | 427 | 2.20 | 2.83 |
| Coming in contact with fixed structures | 10 | 3.27 | 1.99 | 141 | .73 | .86 |
| Getting on or off cars or locomotives | 14 | 4.57 | 4.83 | 2,685 | 13.85 | 14.09 |
| Accidents at highway grade crossings | 4 | 1.31 | 1.14 | 31 | .16 | .20 |
| Struck or run over, not at public crossings | 65 | 21.24 | 21.59 | 173 | .89 | .88 |
| Miscellaneous | 71 | 23.20 | 26.42 | 4,579 | 23.62 | 24.15 |
| **NONTRAIN ACCIDENTS** | | | | | | |
| Total nontrain | 74 | 24.18 | 21.02 | 8,686 | 44.81 | 43.16 |
| Total, all accidents | 306 | 100.00 | 100.00 | 19,386 | 100.00 | 100.00 |

TABLE NO. 90.—NONTRAIN ACCIDENTS, with resulting casualties, classified according to persons and causes, for the year ended Dec. 31, 1953.

SECTION (a).—STATEMENT OF NONTRAIN CASUALTIES

| ITEM | Railways of all classes | |
|---|---|---|
| | Killed | Injured |
| Class of person: | | |
| Employees on duty | 74 | 8,686 |
| Employees not on duty | 4 | 548 |
| Travelers not on trains | 3 | 827 |
| Persons carried under contract | 1 | 36 |
| Other nontrespassers | 11 | 401 |
| Trespassers | 32 | 168 |
| Total | 125 | 10,666 |

SECTION (b).—DISTRIBUTION OF NONTRAIN CASUALTIES ACCORDING TO CLASS OF ACCIDENT

| | | |
|---|---|---|
| Class of accident: | | |
| Employees on duty— | | |
| (a) Shop machinery, stationary engines and motors, cranes, etc. | 2 | 176 |
| (b) Locomotive cranes, steam shovels, dredges, pile drivers, etc. | 4 | 86 |
| (c) Transmission apparatus (belts, gears, shafting, ropes, etc.) | — | 32 |
| (d) Use of hand tools, apparatus, etc. | 1 | 616 |
| (e) Flying particles | 2 | 252 |
| (f) Explosives and inflammable, hot or corrosive substances | — | 174 |
| (g) Electric currents | 6 | 29 |
| (h) Collapse, fall, etc., of objects | 10 | 890 |
| (i) Handling rails, ties, bridge timbers, etc. | 1 | 1,096 |
| (j) Maintenance of way and structures hand cars (nontrain accidents only) | — | 65 |
| (k) Maintenance of way and structures motor cars (nontrain accidents only) | 12 | 387 |
| (l) Handling freight or supplies | 1 | 883 |
| (m) Falls of employees not includible in classes (a) to (l) | 19 | 1,811 |
| (n) Miscellaneous nontrain accidents | 16 | 2,189 |
| Total employees on duty in nontrain accidents | 74 | 8,686 |
| (o) Other persons in nontrain accidents | 51 | 1,980 |
| Total nontrain casualties | 125 | 10,666 |

## APPENDIX C

The safety orders of the California Division of Industrial Safety appear in Title 8, Industrial Relations, of the California Administrative Code, including the indices — they cover approximately 1300 pages.

One of these orders, entitled General Industry Safety Orders, covers 288 pages of which 23½ pages are a table of contents and index. This General Order recites that it is adopted to "fulfill the expressed social public policy of the State of California set forth in Article XX Section 21 of the Constitution, to make full provision for securing safety in places of employment" (§ 3200). § 3202 provides:

> "Application of these orders. These orders establish minimum standards and apply to all employments and places of employment in California as defined by Labor Code Sections 6302 and 6303; provided, however, that when the division has adopted or adopts safety orders applying to certain industries, occupations or employments exclusively, in which like conditions and hazards exist, said orders shall take precedence insofar as they are inconsistent with the General Industry Safety Orders hereinafter set forth."

In addition there are the following safety orders:

Air Pressure Tank
Boiler
Compressed Air
(Governing work in Compressed Air)
Construction
Electrical
Elevator
General Industry
Gold Dredges
Lamp Scaffolds and Parallel Safety Orders
Liquefied Petroleum Gases
Logging and Sawmill
Mine
Painting
Petroleum Industry
Petroleum—Refining, Transportation, Handling
Pneumatic Explosives Loading
Quarry
Ship and Boat Building
Trench Construction
Tunnel
Window Cleaning

The scope of the General Industry Safety Orders is indicated by the nine group headings for the various sections which are as follows:

1. General Hazards
2. General Plant Equipment and Special Operations
3. General Mobile Equipment and Auxiliaries
4. Power Transmission Equipment, Prime Movers, Machines, and Machine Parts
5. Points of Operation of Dangerous Machinery
6. Radiation and Radioactivity
7. Cranes and Other Hoisting Equipment
8. Gas Systems for Welding and Cutting
9. Control of Hazardous Substances.

Under General Hazards there are detailed specifications for railings and handrails (§§ 3225-3227), stairways and entrance to stairways and ladders (§§ 3232-3235), headroom and glass (§ 3236), platforms and runways (§ 3237), openings in walls and floors and other openings (§§ 3238-3240), swinging doors (§ 3241), illumination (§ 3242) and trapdoors and exits (§§ 3243, 3244). Article 4 on housekeeping and maintenance (§§ 3250-3258) deals with working areas, drainage and ventilation, aisles and passageways, prime movers, machines and equipment, as to placing and anchoring, hand trucks, storage of materials and scaffolds. Machinery which must be serviced is to be provided with safe platforms or maintenance runways, with proper access to pits and sufficient working space (§ 3262) and safe means of operation shall be provided for valves and controls (§ 3265). Other provisions cover hoses for air or steam (§ 3273), use of compressed air and gases (§ 3274), shields etc. to guard from flying particles (§ 3275) and warning signs (§ 3281). Article 7 has provisions for personal safety covering head, eye, body, hand, foot protection, etc.

It is impossible to cover in detail all of the provisions but the following is a sampling of provisions which could apply in a wheel foundry, the building of cars or work building a retarder yard,—we indicate only the general subjects covered by the regulations:

Air compressors (§ 3351), ladders (§§ 3356-3358), abrasive wheels (§§ 3393-3399), power transmission equipment, prime movers, machines and machine parts (§§ 3500-3551) covering such things as shafting, belts, pulleys and gears. Group 5 deals with points of operation of dangerous machinery and expressly provides for guarding devices. It covers metal working machines of various types, die casting machines, and wood working machines (there is considerable woodwork on freight cars). Under cranes are included locomotive cranes (see p. 432.136) extensively used in building a yard,—Moreno was hurt working with one,—and there are specifications and requirements for ladders, stairs, platforms and cages; warning devices; controllers including brakes and locking devices, fenders, runways, clearances, wheelguards, stops, hoisting ropes and chains, splices, and operating rules as to size of loads, riding on loads etc. The group on welding covers approved markings, training and instruction, ventilation and lighting, water supply and drain connections etc. Group 9, Control of Hazardous Substances covers dusts, fumes, mists, vapors and gases and in considerable detail deals with hazardous substances.

Air pressure tank and boilers are covered by separate orders. There would be air pressure tanks wherever pneumatic tools were used.

The Construction Safety Orders deal with some things dealt with in the General Safety Order such as railings (Art. 12), floor openings (Art. 14), ramps (Art. 15), runways (Art. 16), stairwells and stairs (Art. 17) and scaffolds

(Art. 20). This order also covers excavations (Art. 4), construction towers and elevators (Art. 7-9), derricks (Art. 24), rivet heaters (Art. 23), ladders (Art. 29), welding protection (Art. 35), power shovels and cranes (Art. 46) and trucks and transportation (Art. 47).

The Electrical Safety Orders, among other things, deal with wiring generally, rotating machinery and working space.

The Quarry Safety Rules would apply to railroads in obtaining their own ballast. The order on transportation industries deals particularly with women and minors (p. 819).